85-692

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

KATHRYN A. SHUBA,
Petitioner,
vs.
AUSTINTOWN BOARD OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

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216/762-0771

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Kathryn A. Shuba

QUESTIONS PRESENTED

1. Did the board of education's radically disparate treatment of a public school teacher who was assigned to teach parochial school students violate the equal protection clause of the Fourteenth Amendment?

2. Did the board of education violate a teacher's due process, liberty interest by willfully concealing and subsequently considering a parochial principal's derogatory information which was dispositive of terminating the teacher who was entitled to tenure and future employment?

3. Considering this Court's recent decision in Loudermill, does a limited contract teacher qualified for tenure,

have a property right in continued employment?

PARTIES BELOW

The parties below were Petitioner, Kathryn Shuba, Appellant in the Supreme Court of Ohio and Respondent, Austintown Local School District Board of Education, Appellee in the Supreme Court of Ohio.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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* * * *

KATHRYN A. SHUBA

Petitioner,

vs.

AUSTINTOWN BOARD OF EDUCATION

Respondent.

* * * *

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

The petitioner, Kathryn Shuba, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on June 19, 1985.

OPINION BELOW

No opinion was rendered by the Supreme Court of Ohio. The opinion of the Ohio Seventh District Court of Appeals, not yet reported, appears in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 19, 1985. dismissing sua sponte, petitioner's appeal for the reason that no substantial constitutional question existed. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitution of the United States, Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code §3317.06, §3319.11, §3319.16, and §3319.25

Statutes are provided in the Appendix.

STATEMENT OF THE CASE

Kathryn Shuba, Petitioner, was a teacher who was assigned to teach four years out of a five year period at Immaculate Heart of Mary parochial school in the Youngstown area under the auspices of the Austintown Local School District Board of Education, (hereinafter "Austintown"), pursuant to a program known as the auxiliary services program authorized by Ohio Revised Code §3317.06. She had a professional teaching certificate effective July 1, 1978, entitling her to tenure; was arbitrarily denied a continuing (tenured) contract in the fall of 1978; and was unjustly dismissed in 1979 without any reasons being given and contrary to Austintown policies.

As a teacher assigned to the auxiliary services program, she received radically disparate treatment and was denied due process and equal protection of the laws of Ohio and the Federal Constitution.

A Complaint was filed on September 26, 1980, and amended in July 1982, alleging, among other things:

1. Breach of contract and subsequent wrongful discharge;

2. Age discrimination;

3. Deprivation of equal protection and due process of law;

4. Conspiracy; and

5. Excessive entanglement.

There was no hearing on the merits of this case as all causes of action were determined by summary judgment.

Kathryn Shuba appealed all issues including her right to a jury trial.

The Ohio Seventh District Court of Appeals, Mahoning County, affirmed the trial court on all issues with the exception of Kathryn Shuba's claim of breach of contract which is not at issue here.

Kathryn Shuba further appealed all matters except the conspiracy and entanglement issues to the Supreme Court of Ohio. In a four to three decision, the Supreme Court of Ohio summarily dismissed the appeal for the reason that no substantial constitutional question existed.

Petitioner filed a Motion for a Rehearing based on this Court's recent decision in Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306 (US March

19, 1985). The Supreme Court denied this motion on June 19, 1985.

Respondent filed a cross appeal which is not material to this Petition.

REASONS FOR GRANTING THE WRIT

I.

THERE IS NO RATIONAL BASIS FOR TREATING TEACHERS ASSIGNED TO THE AUXILIARY SERVICES PROGRAM IN A RADICALLY DISPARATE MANNER.

In Ohio, all teachers are governed by the same contractual rights and responsibilities pursuant to Ohio Revised Code §3319.07 through §3319.17. There is no statute in Ohio which authorizes a separate classification for "auxiliary services teachers". In this case, Austintown assigned Kathryn Shuba to teach in a parochial school and arbitrarily classifed her as an auxiliary

services teacher and treated her as a second class citizen.

Kathryn Shuba was disparately treated as follows:

1. Auxiliary services teacher contracts varied significantly from teachers not teaching in parochial schools.

2. Termination procedures for auxiliary services teachers varied significantly from teachers not teaching in parochial schools.

3. Kathryn Shuba was isolated in a van on parochial school property without being assigned a supervisor or building principal.

4. Austintown failed to comply with their own declared policies and procedures.

a. She was only evaluated during her last year of teaching and was denied an opportunity to correct deficiencies in violation of Austintown's Guidelines for a System of Evaluation.

b. She was not given the opportunity to read the parochial school principal's derogatory letter which formed the basis of the board's action in terminating her, in violation of Austintown's Professional Personnel Records Policy.

c. She had no access to job opportunities, vacancies or transfers.

d. She received no mail, directions or communications in regard to in service meetings or professional programs.

The Seventh District Court of Appeals, Mahoning County relied on Board

of Educ. v. Walter, 58 Ohio St. 2d 368 (1979) cert. den., 444 U.S. 1015 (1980). (Appendix A30-A31):

> Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any classification based 'upon a state of facts that reasonably can be conceived to constitute differences in state policy...' will be upheld. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530, (1959).
>
> This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt...
>
> An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

Certainly, the rational basis test of Board of Educ. v. Walters and Allied, which was an economic and commercial classification, should not apply to this case.

At the minimum level, this Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives". Schweiker v. Wilson, 450 U.S. 221, 230 (1981). This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one,'" id., as 234, quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976); the classificatory scheme must "rationally advance a reasonable and identifiable governmental objective."

Schweiker v. Wilson, 450 U.S., at 235. Logan v. Zimmerman Brush Co., 455 U.S. 422, 439, (1982) (separate opinion by Justices Blackmun, Brennan, Marshall and O'Connor regarding the equal protection claim.)

Disparate treatment of teachers assigned to teach parochial students, unrelated to the operation of the auxiliary services program, was unjustified, and hence arbitrary and in violation of the constitutional guarantee of equal protection.

In this Court's recent decision of City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (US July 1, 1985) Justice Stevens, with whom the Chief Justice joins, concurring with the majority, states:

The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" - for me at least - includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications.

The Austintown board refuses to advance any rationale for the instances of disparate treatment except to indicate that the entire program was in jeopardy of funding cuts. This refusal was accepted as legitimate by the Seventh District Court of Appeals. (Appendix A32). All teachers within the school were subject to the same fiscal uncertainties. No indication was given as why the uncertainty of funding justified the disparate treatment with respect to personnel policies, evaluation procedures, communications, job transfer policies and termination procedures.

Austintown failed to indicate why the auxiliary services program funding was any more uncertain than other educational programs after the constitutionality of the entire program

was upheld. Wolman v. Walter, 433 U.S. 229 (1977). Austintown even continued to affix to a teacher's contract assigned to the auxiliary services program a contingency as to funding after Wolman had been decided. In any event, to the extent that funding for the auxiliary services program was governed by the same rules of fiscal planning as are all legislatively funded programs, teachers within the program should not be disparately treated from teachers not within the program. Indeed, to the extent that any additional uncertainty existed as to the funding of the program, Austintown should have assisted teachers within the program to find job transfer opportunities so as to avoid the appearance of disparate treatment.

The instant case, as well, should be more carefully scrutinized because of involvement of issues concerning Kathryn Shuba's right to work and practice her chosen profession. The distinctly separate interests in this case are: Austintown's responsibility to administer the auxiliary services program and Kathryn Shuba's interest in professional growth and career advancement. A fair balancing of these interests requires a more careful or "heightened" analysis than the usual rational basis test because Austintown policies have pre-empted the teacher's interests. In cases where such "preferred" or "sensitive" as opposed to "fundamental" interests are at stake, the Fourteenth Amendment requires that disparate treatment be viewed with a "heightened

scrutiny." Turner v. Department of Employment Security of Utah, 423 U.S. 44, 46 (1975); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); See generally, Tribe, American Constitutional Law, (1978) Ch. 16, pp. 991-1136.

Under Ohio law, there is only one classification of teachers. Kathryn Shuba had a statutory and constitutionally protected right to be treated equally with other teachers and to be accorded the same treatment pursuant to local board policies and state law. It offends one's sense of justice that school administrators disregard their own official policies, state and constitutional law, and inflict injuries on the teachers assigned to teach in the auxiliary services program.

II.

A TEACHER WHO IS ENTITLED TO TENURE HAS A PROTECTED LIBERTY AND PROPERTY INTEREST IN FUTURE EMPLOYMENT.

A. A teacher who is entitled to tenure has a protected liberty interest in access to information determinative of future employment.

In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972), this Court stressed that procedural due process must accompany the termination of a public employee if the discharged employee has been deprived of a property or liberty interest protected by the Fourteenth Amendment.

Liberty takes on an additional meaning where termination of employment is involved. This Court in Arnett v. Kennedy, 416 U.S. 134 (1974), held that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of the employee.

In this case, had Petitioner been able to proffer evidence on the merits, it would have been shown that evidence used by the Board in determining whether or not to renew Kathryn Shuba's teaching contract was withheld from her, and only produced as part of the discovery process in the instant litigation.

Furthermore, Kathryn Shuba was subjected to unorthodox evaluation procedures which effectively prevented

her from having the opportunity afforded other teachers not within the auxiliary services programs, to make use of the evaluation recommendations and to correct any deficiencies in her teaching style.

The effect of the Board's action was to prevent Kathryn Shuba from the right to pursue her chosen occupation and to protect her reputation as an effective educator, both of which are liberty interests protected by the Fourteenth Amendment.

To date, as a result of the stigma imposed by her termination, she has been unable to acquire employment as a teacher. As a holder of bachelor's and master's degrees in education, and professional and supervisory teaching certificates, she has been irreparably harmed.

In Roth, this Court stated:

> While this court has not attempted to define with exactness the liberty... guaranteed (by the Fourteenth Amendment) the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge... 408 U.S. at 572.

B. A teacher who is entitled to tenure has a protected property interest in continued employment, requiring both procedural and substantive precautions prior to termination.

This Court has clearly held that a tenured teacher has a property interest in continued employment; Board of Regents v. Roth, 408 U.S. 564 (1972); and has

most recently indicated that "the significance of the private interest in retaining employment cannot be gainsaid"; Cleveland Board of Educ. v. Loudermill, 53 U.S.L.W. 4306 (US March 19, 1985).

The competing interest as emphasized in Loudermill, must be balanced with:

> "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees, and the avoidance of administrative burdens, and the risk of an erroneous termination." Id., at 4308.

In this case, Kathryn Shuba had fulfilled the statutory requirements for a tenured contract and had submitted the appropriate documents to the board for processing her professional certificate. Because of the disparate treatment, a delay resulted in processing the documents causing the appropriate

professional teaching certificate to be issued after Kathryn Shuba signed a limited (non-tenured) employment contract, dated as being effective before having signed the contract. In any event, Kathryn Shuba held the professional certificate early into her final year of teaching in Austintown and well before the Board's action in terminating her.

Qualifications for a continuing contract (tenure) required that a teacher have a professional teaching certificate and have taught three out of five years in the school district. Ohio Revised Code §3319.11. (Page's 1980). A professional certificate is granted to teachers who have met the standards of preparation, experience, and teaching

success set by the board. Ohio Revised Code §3319.25. (Page's 1980).

As one qualified for tenure, Kathryn Shuba had an expectation that she would be afforded appropriate opportunities with which to defend her right to continued employment and be given appropriate procedural devices with which to pursue the substantive rights involved. Such meaningful opportunities were denied.

Kathryn Shuba was terminated on April 23, 1979. (Appendix A68). No reasons for the termination were given to her.

The Ohio Revised Code provides procedures to be adhered to by a board in terminating the contract of a teacher and further provides that such termination may not be made without just cause. Any

teacher who is teaching, or should be teaching, under a continuing contract is deemed to be employed until the "teacher resigns, elects to retire... or is terminated or suspended." Ohio Revised Code Ann. §3319.16 (Page's 1980). Thus a teacher in such a situation is statutorily guaranteed minimum procedural rights on termination.

Clearly, Austintown failed to comply with the provision of this statute and failed to provide the due process conferred by Constitutional guarantee. Loudermill, 53 U.S.L.W. at 4308.

Since the language of the statute is such as to grant only a minimal standard of protection to a teacher, a board of education is free to adopt more stringent procedural safeguards so long as the rights and responsibility of the school

board is not thereby abrogated. Struthers City School Board of Educ. v. Struthers Educ. Ass'n, 6 Ohio St. 3d 308 (1983); Tracy v. Otsego Board of Educ., 6 Ohio St. 3d 305 (1983); and Dayton Teachers Ass'n v. Dayton Board of Educ., 41 Ohio St. 2d 127 (1975).

In the instant case, Austintown, after negotiations with the Austintown Education Association, as collective agent of the teachers within the district, adopted a Teacher Contract Non-Renewal Policy that specifically provided that "a teacher under a limited contract shall be notified by the Board, in writing by April 30th, of the Board's intent not to re-employ. A teacher so notified will be advised of the cause for such a decision." (Emphasis added).

While Kathryn Shuba has argued that she held a professional certificate and was entitled to the benefits of a continuing contract, assuming, arguendo, that indeed the limited contract by which Kathryn Shuba was employed was valid, the board failed to abide by its own policy in non-renewing Kathryn Shuba.

The Seventh District Court of Appeals, Mahoning County, held that under Ohio Revised Code §3319, a non-tenured teacher had no expectancy of continued employment pursuant to Matheny v. Bd. of Educ., 62 Ohio St. 2d 362, 364 (1980), and Ryan v. Aurora City Bd. of Educ., 540 F. 2d 222 (6th Cir. 1976), cert. den., 429 U.S. 1041 (1977). (Appendix A31-A32).

Kathryn Shuba's facts are unlike the facts in Ryan and Matheny. The teachers in Ryan and Matheny did not hold

professional certificates, they were not disparately treated by being assigned to teach in the auxiliary services program, and the schools did not have negotiated policies and procedures. The Ohio courts totally ignored the following first and fourth headnotes in Ryan:

> Due Process hearing must be accorded a non-tenured teacher if his contract is not renewed because he exercised his rights of free speech as guaranteed by First Amendment or if non-renewal is in violation of self-incrimination clause of Fifth Amendment, Due Process Clause of Fifth or Fourteenth Amendment, or equal protection clause of Fourteenth Amendment.
>
> Non-tenured teacher may acquire expectancy of continued employment where policies and practices of the institution rise to the level of implied tenure.

Kathryn Shuba was assigned to teach in the auxiliary services program. Each year, she was given a Notice-Termination

of Contract and then rehired each fall. Having received her professional teaching certificate in 1978, and qualified in all respects for a continuing contract, she reasonably expected continued employment in April 1979.

Clearly, Kathryn Shuba had a protected liberty and property interest in retaining employment. Unequivocably, she was denied any procedural due process and as a result of this unjust deprivation of her constitutional rights she has been unable to secure another teaching position.

CONCLUSION

This case involves a school board's blatent disregard of Kathryn Shuba's constitutional rights. This case involves three state courts which have

summarily dismissed Kathryn Shuba's substantial constitutional claims without a trial to determine the facts or merits of her case. She has not had a hearing to cross examine witnesses or to present witnesses on her behalf. This is a travesty of justice! Petitioner requests that this Court grant her Petition for a Writ of Certiorari to review the judgment from the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO

OVERRULING THE MOTION TO CERTIFY

(Dated June 19, 1985)

No. 85-486

THE SUPREME COURT OF OHIO

Columbus, Ohio

* * * *

KATHRYN A. SHUBA

Appellant / Cross Appellee

vs.

AUSTINTOWN BOARD OF EDUCATION

Appellee / Cross Appellant

* * * *

APPEAL FROM THE COURT OF APPEALS

FOR MAHONING COUNTY

Upon consideration of the motion and cross-motion for an order directing the Court of Appeals for Mahoning County to

certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO

OVERRULING MOTION FOR REHEARING

(Dated June 19, 1985)

No. 85-486

THE SUPREME COURT OF OHIO

Columbus, Ohio

* * * *

KATHRYN A. SHUBA

Appellant / Cross-Appellee

vs.

AUSTINTOWN BOARD OF EDUCATION

Appellee / Cross-Appellant

* * * *

It is ordered by the Court that rehearing in this case be and the same is hereby denied.

DECISION AND JOURNAL ENTRY OF THE

COURT OF APPEALS

(Dated January 25, 1985)

Case No. 83 C.A. 81

IN THE COURT OF APPEALS

SEVENTH JUDICIAL DISTRICT

* * * *

KATHRYN A. SHUBA

Plaintiff / Appellant

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant / Appellee

* * * *

Appeal From Judgment Entered in the Common Pleas Court County of Mahoning, Ohio Case No. 80 CV 1712

DECISION AND JOURNAL ENTRY

LYNCH, J. Retired.

Plaintiff is appealing all the judgments of the Common Pleas Court in

this case which sustained the various motions of defendants for summary judgments. Such a motion, as to Count I of plaintiff's Complaint, was sustained by the trial court by a Judgment Entry dated February 8, 1982. As to Counts II, III and IV of plaintiff's Complaint, such a motion was sustained by the trial court by a Judgment Entry dated September 13, 1982. As to Count V, which was included in plaintiff's Amended Complaint, which was filed August 9, 1982, such a motion was sustained by the trial court by a Judgment Entry dated June 15, 1983.

The record in this case is voluminous and consists of two volumes of the transcript of the pleadings and original papers with 121 items which include, among other things, several affidavits. In addition thereto, there

are depositions of all the pertinent parties and non-parties in this case which total approximately 800 pages.

Most of the pertinent facts of this case are undisputed. However, there are some disputed facts which will be pointed out in this opinion together with the source of such facts.

Plaintiff was employed by defendant Board of Education as a teacher of remedial reading under the auxiliary services program in the Immaculate Heart of Mary Parochial School for the school years 1974-75, 1976-77, 19877-78 and 1978-79, under a series of one-year limited contracts. Her services with defendant Board of Education were terminated at the end of the 1978-79 school year.

Plaintiff's employment history with defendant Board of Education is intertwined with the history of federal court litigation over the constitutionality of state aid to nonpublic school students. Prior to plaintiff's employment, Ohio's "Auxiliary Services" educational program was unsuccessfully challenged in 1974 by citizens and taxpayers on First Amendment grounds. Wolman v. Essex, Case No. 73-292 (S.D. Ohio 1974).

The Wolman case was appealed to the United States Supreme Court which vacated the judgment of the District Court and remanded the case for further consideration in light of Meek v. Pittinger (1975), 421 U.S. 349. Wolman v. Essex (1975), 421 U.S. 982.

The Ohio General Assembly then repealed the existing Auxiliary Services program effective August 29, 1975 (136 Ohio Laws 524) and enacted a new Auxiliary Services program to cure the constitutional defects. This statute was also challenged. On June 21, 1976, a three judge district court panel held the newly enacted Auxiliary Services program constitutional in all respects. Wolman v. Essex (1976), 417 F. Supp. 1113 (S.D. Ohio). This decision was appealed.

On July 24, 1977, the United States Supreme Court upheld the Auxiliary Services program because the teachers had to be employed by the public school board or by the State Department of Health and had to provide the services "in public schools, in public centers, or in mobile units located off the nonpublic school

premises." Wolman v. Essex (1977), 433 U.S. 233, 244-248. R.C. 3317.06(G).

Plaintiff graduated from Youngstown State University in 1972 and did substitute teaching for the following two school years. Upon the recommendation of the principal of Immaculate Heart of Mary Parochial School, plaintiff was initially employed by defendant Board of Education for the 1974-75 school year under the auxiliary services program. She taught in Immaculate Heart of Mary School Building and was supervised by the principal of such school.

Because of the United States Supreme Court decisions on governmental aid to religious schools, there was no state funds for the 1975-76 school year and the Catholic Diocese of Youngstown hired plaintiff to continue teaching remedial

reading at Immaculate Heart of Mary School for the 1975-76 school year.

Since the constitutionality of the newly enacted state laws on auxiliary services was upheld by the United States District Court in June 1976, state funds became available for auxiliary services and plaintiff was hired by defendant Board of Education for the 1976-77 school year.

Under the auxiliary services program, of which the state is the only source of funding, the State of Ohio requires public school districts to provide certain services including remedial reading and supplies to nonpublic students. R.C. Sections 3317.024(P) and 3317.06.

The guidelines for the implementation of applicable statutory

provisions providing services and materials to pupils attending nonpublic schools, which were issued by the Ohio Department of Education, state that the public school district shall provide the delineated educational services and materials pursuant to applications submitted jointly by the administrative head of the nonpublic school and a parent (of a nonpublic school pupil) representative from each nonpublic school within the district.

Since it was the prerogative of each parochial school to determine the specific auxiliary services it desired, each school year and state funds were the only source for such program, defendant Board of Education nonrenewed the limited contracts of auxiliary services teachers in April of each year. This procedure

was applied to plaintiff. If the auxiliary services funds were available and the parochial school requested the particular services for the next school year, defendant Board re-employed the auxiliary services teacher. In this manner, defendant rehired plaintiff for the 1976-77, 1977-78, and 1978-79 school years upon the recommendation of the school principal of Immaculate Heart of Mary Parochial School.

It was the policy of defendant Board of Education to evaluate every teacher, who would become eligible for a continuing contract at the end of a particular school year, during the school year prior to such eligibility and that such evaluation would be done by the principal of the school at which such teacher taught. Pursuant to such policy,

defendant Valot, the Superintendent of defendant Board of Education, met with Sister Mary deAngelis, principal of Immaculate Heart of Mary Parochial School in March 1978 and requested her to evaluate plaintiff. However, such principal declined to do so because the youngstown Catholic Diocese took the position that, pursuant to the law, auxiliary service teachers were public employees and should be evaluated by the administrative personnel of the school district which employed them.

By letter dated May 25, 1978, to Valot, Sister Mary deAngelis, stated, in pertinent part, as follows:

> "Mrs. Kathryn Shuba wishes to apply for tenure with the Austintown Board of Education as a remedial reading teacher and has asked me to write my recommendation in this regard.

"...I have known Mrs. Shuba for the past two years and have observed the work she has done in remedial reading during this time. Although I had planned to rehire her for the next school year, I would not recommend her for tenure for the following reasons:

"-Her work with the students is only fair and she is weak in discipline even with the small groups

"-State funds for rehiring special teachers are not that certain from year to year as we have experienced in the past

"-The needs of the school in the future may be such that the money might be used better for other services such as an LD Tutor.

"Because of the above circumstances I highly discourage tenure for Mrs. Shuba. It is my understanding that the above recommendation will be kept confidential."

LD Tutor in the above letter means Learning Disabilities.

Because of the request of Sister Mary deAngelis, that the contents of the

above letter be kept confidential, defendant Valot did not inform plaintiff of such letter.

Since plaintiff was not being supervised by any public school principal, defendant Valot arranged with defendant, Dr. James H. Baker, Director of Instruction of defendant, Board of Education, to evaluate plaintiff. At Dr. Baker's invitation, plaintiff attended an in-service evaluation workshop on August 28, 1978 for all teachers that were going to be evaluated during the 1978-79 school year. At this workshop, the entire evaluation policy consisting of microteacher approach as well as the target approach and the procedures one would follow during the evaluation process was reviewed.

In September 1978, Dr. Baker telephoned plaintiff and advised her that he was going to visit her van for purposes of observing her teaching and to have a conference with her about her teaching and the evaluation approaches that he intended to follow. Dr. Baker made approximately eight observations of plaintiff's teaching. Based on his evaluations of plaintiff, defendant Dr. Baker recommended to defendant Mr. Valot that plaintiff's teaching contract be nonrenewed because of her poor performance as a teacher.

Defendant Mr. Valot agreed with Dr. Baker and recommended in conjunction with the county superintendent, to defendant Board of Education that plaintiff's teacher contract be nonrenewed.

Defendant Board of Education followed such recommendation.

By notice, dated April 23, 1979, defendant Board of Education notified plaintiff that it was not the intention of defendant Baord of Education to reemploy plaintiff at the expiration of her Limited Teacher's Contract.

Pursuant to a policy of defendant Board of Education, plaintiff conferred twice with Mr. Valot in May 1979 concerning her nonrenewal once with plaintiff alone and once with plaintiff and Mr. Donald H. Evans, president of the Austintown Education Association. Plaintiff then asked to be heard by defendant Board of Education. Defendant Board of Education granted her request and permitted plaintiff to be heard at their June 1, 1979 meeting in executive

session at which plaintiff appeared with Mr. Evans and Attorney David Roloff, whose assistance was obtained for plaintiff by Mr. Evans through the Ohio Educational Association. This meeting did not change defendant Board of Education's nonrenewal of plaintiff's contract.

Plaintiff became dissatisfied with the services of Attorney Roloff and she retained the services of Attorney Judith A. Nicely of Akron, Ohio, who filed the complaint in the case on September 26, 1980.

Defendant Board of Education filed a motion for attorney fees pursuant to 42 U.S.C. Section 1988, which was overruled by the trial court. Defendant Board of Education filed an appeal on this judgment of the trial court.

Plaintiff's first assignment of error is that the trial court erred in granting defendants' motion for summary judgment on plaintiff's Breach of Contract pursuant to Ohio Revised Code 3319.11 (continuing service status and contract) and a subsequent wrongful discharge pursuant to Ohio Revised Code 3319.16 (termination of contract by Board of Education without due process hearing).

This assignment of error is Count I in plaintiff's complaint.

R.C. 3319.11 provides, in pertinent part, as follows:

> "Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district,...."

Plaintiff contends that she was eligible for continuing contract when she was rehired for the 1978-79 school year.

"...."

In instant case, it was established that plaintiff was a teacher and had taught for at least three years in the district. On of the issues in this case was whether she held a professional certificate at the time of her re-employment on August 28, 1978.

R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year.

Plaintiff contends that when she signed her contract with defendant Board of Education on August 28, 1978, for the 1978-79 school year, she had given notice of her application and eligibility for tenure prior to signing the contract.

When plaintiff was rehired by defendant Board of Education on August 28, 1978, for the 1978-79 school year, she had a provisional teaching certificate. However, on June 23, 1978, plaintiff filed her application and credentials for a professional teacher's certificate to the Mahoning County Board of Education for submission to the State Board of Education.

Section 3301-21-09(c)(1) of the Ohio Administrative Code provides, in pertinent part, that an applicant for a professional teacher's certificate must be employed full-time in the schools of Ohio at the time of application.

Since plaintiff's employment with defendant had been terminated at the end of the 1977-78 school year, the superintendent of the Mahoning County

Board of Education did not forward plaintiff's application for a professional teacher's certificate to the State Board of Education until plaintiff's re-employment for defendant Board on August 28, 1978. The State Board of Education issued a professional teacher certificate on October 19, 1978, for the period from July 1, 1978 through June 30, 1986.

Plaintiff contends that she had a professional teacher certificate on August 28, 1978 on the basis of the language on her professional teacher certificate. Defendant Board contends that a teacher desiring a continuing contract must have his or her professional teacher certificate by the preceding April 30 when limited contracts have to be renewed or nonrenewed.

Defendant Board of Education attached to its Motion for Summary Judgment, dated September 14, 1981, the affidavit of Martha F. Dimit, Assistant Director of the Division of Teacher Education and Certification, Ohio Department of Education, which consisted of eight pages. The pertinent part of such affidavit is as follows:

> "23. On July 1, 1976, the Division of Teacher Education and Certification implemented a procedure whereby all teacher's certificates are given an effective date of July 1 in the school year they are issued, regardless of the date of issuance of the certificate. Prior to July 1, 1976, all teacher's certificates were given an effective date of September 1 in the school year they were issued. The current July 1 date is assigned to all certificates for administrative convenience only so that there is a uniform expiration date of June 30 on all certificates. The date of issuance is separately noted on each teaching certificate issued by

the Division." (Emphasis added.)

Prior to April 30, 1978, plaintiff was notifed by defendant Board of Education that it was not its intention to re-employ plaintiff at the expiration of her Limited Teacher's contract.

The established case law is that under the facts of instant case, plaintiff was not entitled to a continuing contract because her employment had been terminated by defendant Board of Education at the expiration of plaintiff's Limited Teacher's contract for the 1977-78 school year. State, ex rel. Hura v. Board of Education (1977), 51 Ohio St. 2d 19; State, ex rel. Paul v. Board of Education (1975), 44 Ohio St. 2d 5; Pascoe v. Board of Education (Feb. 18, 1983) Erie County

Case No. E-82-32 (Unreported, Ct. App. 6th District) m.c.o. May 25, 1983.

We agree with the above cited cases and hold that plaintiff was not entitled to a continuing contract on her reemployment in August 1978 under the facts of this case.

Plaintiff, in her brief and assignments of error which was filed September 6, 1983, raised the issue that tenured teachers have a right to receive notice of the reasons for their terminations and a right to a hearing on such terminations pursuant to R.C. 3319.16. Since we have determined that plaintiff had not obtained tenure, we hold that R.C. 3319.16 does not apply to plaintiff's termination.

"...." (The remaining argument regarding Austintown's Teacher Contract

Non Renewal Policy is not on appeal and omitted. p 11-16 of original appeal.)

Plaintiff's third and fourth assignments of error are as follows:

> 3. The court erred by granting defendants' motions for summary judgments in regards to Kathryn Shuba's deprivation of equal protection and due process causes of action.
>
> 4. The court erred in granting summary judgment in plaintiff's cause of action which alleged that Mr. Valot and Dr. Baker conspired to deprive her of her constitutional rights.

Plaintiff's third assignment of error is Count III in Plaintiff's complaint and her fourth assignment of error is Count IV in plaintiff's complaint. We will discuss these assignments of error together because they are interrelated. The actions of defendants, Mr. Valot and Dr. Baker, which were done in the performance of the

duties of the positions they held with defendant Board, are the basis for both assignments of error.

Plaintiff alleges, pursuant to Title 22 (sic 42) of the United States Code, Sections 1983 and 1985 (3), that she has been deprived of "...rights, privileges and immunities secured by the constitutional laws of the United States..." by actions of defendants, Mr. Valot and Dr. Baker, under color of law by discriminating against plaintiff by segregating her in a parochial school.

Section 1984 of Title 22 (sic 42) of the United States Code provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress...."

Section 1985 of Title 22 (sic 42) of the United States Code provides, in pertinent part, as follows:

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a

> legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United Sttes, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

We have set out the entire context of Section 1985(3) of Title 22 (sic 42) because we do not think that any part of the above quoted language applies to the facts of this case.

The facts in this case are not included in a "suspect classification" or impair a fundamental right. "Suspect classifications" include those based on alienage, race or ancestry "Fundamental rights" include the right to vote and for interstate travel. Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, 312 n. 3 and 4.

Under the facts of this case, we hold that the "rational basis" test is applicable. In Bd. of Edn. v. Walter (1979), 58 Ohio St. 2d 368, the court, at page 376, stated as follows:

> "Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any classification based 'upon a state of facts that reasonably can be conceived to constitute a distinction, or differences

in state policy...' will be upheld. Allied Stores of Ohio v. Bowers (1959) 358 U.S. 522, 530.

"This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt. Paragraph one of the syllabus in State, ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142 states:

"An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'

"It is against this standard that we must determine if a violation of the Equal Protection and Benefit Clause exists here."

We have previously held in this opinion that plaintiff did not have a continuing contract with defendant Board. In Matheny v. Bd. of Edn. (1980), 62 Ohio

St. 2d 362, the court, on page 364, stated, in pertinent part, as follows:

> "We hold that under the provisions of R.C. Chapter 3319, a non-tenured teacher has no expectancy of continued employment past the term of his limited contract. Therefore, there is no property right involved here as claimed by appellants."
>
> In accord: DePas v. Board of Edn. (1977), 52 Ohio St. 2d 193.

Pertinent headnotes of Ryan v. Aurora City Bd. of Education (1976, 6th Cir), 540 F. 2d 222 Cert denied; 429 U.S. 1041 (1977), are as follows:

> "2. Civil Rights Act of 1871 was never intended as catchall statute under which myriads of suits, traditionally within exclusive jurisdiction of state courts, might be filed in federal cours in absence of showing of deprivation of constitutional right. 42 U.S.C.A. Sec. 1983; U.S.C.A. Const. Amend. 14.
>
> "3. Judicial review in actions of school authorities involving

administration of state teacher tenure laws is in state court, not federal courts, with exception of cases involving teachers' constitutional rights of free speech, self-incrimination, equal protection and due process. U.S.C.A. Const. Amends. 1, 5, 14.
"....

"5. Nontenured teacher had no expectancy of continued employment, whatever might be policies of institution, where there existed statutory tenure system; since property interests were created by state law and not Constitution, fact that state limited guarantee to only tenured teachers necessarily negatived any property interest. R.C. Ohio Secs. 3319.08, 3319.11, 3319.16; U.S.C.A. Const. Amends. 1, 5, 14; 42 U.S.C.A. Sec. 1983.
"....

"8. Necessity for statement of reasons for nonrenewal of nontenured teachers' employment contracts, and adequacy or accuracy of such statements, are matters of state law, not federal constitutional law."

In accord: Bishop v. Wood (1976), 426 U.S. 341; Orr v.

Trintor (1971 - 6th Cir) 444 F.2d 128; Cert. denied; 408 U.S. 942 (1972) reh. denied 409 U.S. 943 (1972).

In Great American Federal Savings & Loan Ass'n v. Novotny (1979), 442 U.S. 366, the court held, in pertinent part, as follows:

> "Section 1985 (3)...creates no substantive rights itself but is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right -- to equal protection of the laws or equal privileges and immunities under the laws -- is breached by a conspiracy in the manner defined by the section."
>
> See United Brotherhood of Carpenters and Joiners of America v. Scott (1983) _____ U.S. _____, 77 L. Ed 2d 1049.

The constitutionality of the auxiliary services program was under attack in federal courts at the beginning of plaintiff's employment with defendant Board. This issue was uncertain until

July 24, 1977 when the constitutionality of this program was upheld in Wolman v. Essex (1977), 433 U.S. 233. However, because of said case, defendant Board had to provide such auxiliary services in mobile units located off the nonpublic school premises. Wolman v. Essex (1977), 433 U.S. 233, 244-48; R.C. 3317.06(G). Because of this, such auxiliary services teacher did not have a public school principal supervising them as was the case with public school teachers and they were isolated from other public school teachers because they had to teach in a mobile van near the parochial school where they were teaching. Also, parochial school principals have discretion annually as to how they will use available auxiliary service funds.

17 Ohio Jurisprudence 3d 153-155, Constitutional Law, Section 630, states as follows:

> "Neither the state nor federal constitutional provisions guaranteeing equal protection of the laws deprives the Ohio General Assembly of a broad power of classification and differentiation of persons and subject matter in legislative enactments. Indeed, classification is an inherent right and power in the legislature, and the constitutional guaranty of equal protection of the laws does not dispense with all classification. Constitutional provisions against discriminatory laws do not require laws to apply to every one within the state and to affect all in an identical manner. The Constitution does not exclude class legislation, provided there is reasonable basis for the classification. If a particular classification is proper the discrimination it involves is unobjectionable.
>
> "So long as classifications have a real and substantial basis they cannot be said to be violative of the equal protection clause even though

> the lines drawn therein are very narrow. If the law affects all similarly situated in the same manner, it satisfies the constitutioanl requirement."
>
> See Board of Regents v. Roth (1972), 408 U.S. 564.

We hold that the conditions under which auxilary services teachers, such as plaintiff, worked in the Austintown School District, were a result of the United States Supreme Court decision upholding the constitutionality of governmental aid to religious nonpublic schools and that this was a real and substantial basis for the conditions of employment for such auxiliary services teachers.

Specifically, plaintiff alleges that defendant Board violated its policies set out in Austintown's Policy Hankbook in its treatment of plaintiff in the

following policies: (1) Contracts; (2) Evaluation; (3) Professional Personnel Policy; (4) Special Reading Classes; (5) Appointment, Assignment and Transfer of Employees; (6) Grievance Procedures; (7) Equal Oportunity Policy; and (8) Reduction in Force Policy.

Plaintiff claims that auxiliary services teachers were treated differently from regular teachers in that auxiliary services teachers' contracts contained language that continued service was contingent upon funding by the State of Ohio. There was no authority for such language either by statute or from the state Board of Education. Auxiliary services was new to the public school superintendents in Ohio during subject time period and there was no guidance from the State Board of Education as to

what type of limited contracts to give to auxiliary service teachers. Mr. Valot testified that such language was used in the beginning years of such contracts, because the constitutionality of such program was being litigated in the federal courts. Eventually, they eliminated such language from the auxiliary service contracts. The only purpose that such language served was to inform auxiliary services teachers that their services were being solely paid by state funds and was contingent upon such funds. Plaintiff was discharged for poor performance rather than because of subject language so that we cannot understand how subject language prejudiced plaintiff.

Plaintiff points out that the Austintown's Teacher Contract Policy

provided that a limited contract should be for one (1) year and the plaintiff's contract received a limited contract from September through June. R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year. We hold that plaintiff's limited contracts with defendant Board complied with R.C. 3313.62.

Plaintiff also points out that all auxiliary services limited teaching contracts were terminated in April of each year. Evidence of defendant Board was that teachers in public schools in special programs were also similarly nonrenewed contingent upon the programs being refunded by the state or for reduction in force.

Plaintiff also claims, under this assignment of error, that defendant Board

did not comply with its "Teacher Contract Non-Renewal Policy" because plaintiff was not advised of the reason for her non-renewal and none of her witnesses were allowed to testify at the June 1, 1979 meeting of defendant Board. This was discussed and determined under plaintiff's first assignment of error.

Plaintiff has three complaints on her evaluation. She points out that Austintown's Policy Handbook under the title of "Management of Staff Evaluation" provides that all staff members in their first and second year of employment will participate in a professional growth evaluation process and that plaintiff was evaluated for the first time in her fourth and final year of teaching. Mr. Valot testified that this rule was changed in 1978; that prior to that time

the rule stated that "Initial formal evaluation should focus on second year staff members;" that the principal of each school performs such evaluations and that he assumed that the principal of Immaculate Heart of Mary evaluated plaintiff because such principal had to recommend plaintiff for employment each year. Immaculate Heart of Mary had no record of evaluations of Plaintiff.

There is nothing in the record to indicate that Mr. Valot deliberately overlooked the professional growth evaluation process of plaintiff. That was a matter that he delegated to the principals of schools, and plaintiff did not have a public school principal. We hold that that is not a constitutional question pursuant to the Ryan Case.

Plaintiff points out that unlike teachers in the public schools, who were evaluated by their principals, plaintiff was evaluated by Dr. Baker, Director of Instruction. We hold that this was a condition of employment for plaintiff that was common to all auxiliary service teachers as a result of the United States Supreme Court decision in Wolman v. Essex (1977), 433 U.S. 233 and that defendant Board and this court are bound by such decision.

Plaintiff complains that the evaluation done by Dr. Baker was threatening, confusing, subjective and unreasonable. Both Mr. Valot and Mr. Donald H. Evans, president of the Austintown Education Association, testified that Dr. Baker is the most trained and best qualified in the

Austintown School System to give evaluations of teachers.

Plaintiff also complained that Dr. Baker evaluated plaintiff by both the Micro Teaching observation and the appraisal by Targets instruments. We hold that the person performing such evaluation is authorized to use both instruments for evaluation by the applicable policy statement.

We have reviewed plaintiff's claims of alleged violations by defendant Board of its policies on Professional personnel Policy; Special Reading Classes; Appointment, Assignment and Transfer of Employees; Grievance Procedures; and Reduction in Force and hold that such claims are irrelevant to this action.

Plaintiff's claim as to the policy in Austintown's Policy Handbook entitled

"Equal Opportunity Policy" deals with alleged age discrimination against plaintiff. We have discussed and determined this claim under plaintiff's second assignment of error.

The record of this case establishes that defendants, Mr. Valot and Dr. Baker, attempted to treat plaintiff the same as the teachers in their public school system as much as it was possible to do so under the circumstances that plaintiff was hired under the auxiliary services program.

We hold that plaintiff was not deprived of constitutional equal protection and due process rights in this case. We further hold, as a matter of law, that Sections 1983 and 1985(3) of Title 22 (sic 42) of the United States

Code are inapplicable to the facts of this case pursuant to the Ryan case.

For the foregoing reasons, we hold that neither Sections 1983 or 1985 of Title 22 (sic 42) of the United States Code are applicable to this case and that plaintiff's third and fourth assignments of error are without merit.

"...." (Plaintiff's fifth and sixth assignment of error are not on appeal. Pages 28 - 36 of decision omitted.)

JOURNAL ENTRY OF THE COURT OF APPEALS

Case No. 83 C.A. 81

IN THE COURT OF APPEALS

SEVENTH JUDICIAL DISTRICT

* * * *

KATHRYN A. SHUBA

Plaintiff / Appellant

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant / Appellee

* * * *

JOURNAL ENTRY

For the reasons stated in the opinion rendered herein, it is the final judgment and order of this court that judgment of the Common Pleas Court of Mahoning County, Ohio, is affirmed as to Counts II, III, IV and V of plaintiff's complaint and amended complaint as well as overruling plaintiff's motion for a

jury trial. As to Count I of plaintiff's complaint, judgment is affirmed as to the part holding that plaintiff was not entitled to a continuing contract on her re-employment in August 1978 and reversed as to the part on factual questions as to whether plaintiff was advised by defendant Board of Education of the reason for its non-renewal of her teacher's contract or April 23, 1979 and whether she was permitted to have witnesses testify at the June 1, 1979 meeting of defendant Board of Education.

Judgment reversed on the overruling of defendant Board of Education's motion for an award of attorney fees pursuant to 42 U.S.C. Section 1988 as to Counts III, IV and V.

Case remanded for further proceedings pursuant to law as to the

factual questions at issue in Count I of plaintiff's complaint and as to defendant Board of Education's motion for attorney fees pursuant to 42 U.S.C. Section 1988.

Final judgment as to defendant Board of Education's motion to order plaintiff to answer its Requests for Admissions. The motion of defendant Board of Education to order plaintiff to answer defendant Board's Request for admissions sustained. plaintiff must admit or deny each of the six requests within ten (10) days after the journalization of this opinion pursuant to Civil Rule 37(A) or such requests for admission will be admitted as true. Costs to be pro-rated between the appellant and appellees.

/s/ JOHN J. LYNCH
Retired

FINDING OF THE COURT OF COMMON PLEAS

(Filed February 5, 1982)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

FINDING

Motion of Defendant for Summary Judgment Count I Sustained.

Motion of Plaintiff for Summary Judgment Court I Overruled.

/s/ Judge E. Jenkins

ORDER AND JUDGMENT OF THE

COURT OF COMMON PLEAS

(Filed September 9, 1982)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

ORDER AND JUDGMENT

This matter came on for hearing pursuant to separate Motions for Summary Judgment filed by each of the defendants, Austintown Board of Education, Merlin H. Valot, Jr., and Dr. James H. Baker. The issues presented to the Court for

determination by summary judgment include Counts Two, Three, and Four of the plaintiff's Complaint. Arguments were presented by all counsel to the Court at a hearing on July 13, 1982. Each of the parties to this lawsuit have filed Briefs setting forth their respective positions.

Count Two of the plaintiff's Complaint alleges that she was discriminated against due to her age, in violation of Ohio Revised Code Section 4101.17. Based upon the pleadings, depositions which have been filed with the Court, and the Briefs of the parties, the Court finds that there is no genuine issue as to any material fact with regard to Count Two of the plaintiff's Complaint and further, that each of the defendants are entitled to judgment as a matter of law. The Court finds that upon

reviewing the evidence and construing such evidence most strongly in favor of the plaintiff, reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

Count Three of the plaintiff's Complaint alleges that the plaintiff has been deprived of her life, liberty, and property without due process of law and that her right to equal protection of the law under the Ohio Statutes, Constitution of the State of Ohio, and the Fourteenth Amendment of the Constitution of the United States. Plaintiff also alleges deprivation of rights privileges and immunities in accordance with Title 42 §1983 U.S.C. After listening to the arguments of the parties and carefully reviewing the depositions and pleadings which have been filed with the Court, the

Court finds that there is no genuine issue as to any material fact and that each of the defendants are entitled to judgment as a matter of law. Upon reviewing the evidence and construing such evidence most strongly in favor of the plaintiff, the Court finds that with regard to Count Three of the plaintiff's Complaint that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

Count Four of the plaintiff's Complaint alleges that in accordance with Title 42 of the United States Code, Section 1985(3), she has been deprived of rights, privileges, and immunities secured by the Constitutional Laws of the United States. Plaintiff further alleged that a conspiracy was formed between Merlin H. Valot, Jr. and Dr. James H.

Baker for the purpose of depriving her of equal protection of the laws and due process. Based upon the arguments of counsel at the hearing on July 13, 1982, and after careful review of the Briefs which have been filed by each of the parties, the pleadings, and the depositions filed with the Court, the evidence shows that there is no genuine issue as to any material fact and that each of the defendants are entitled to judgment as a matter of law on Count Four of the plaintiff's Complaint. Based upon all of the evidence, and construing such evidence most strongly in favor of the plaintiff, the Court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the Motions for Summary Judgment filed by the defendants, Austintown Board of Education, Merlin H. Valot, Jr., and Dr. James H. Baker, are granted. Counts Two, Three, and Four of the plaintiff's Complaint are hereby dismissed as to each of the named defendants.

/s/ Judge E. Jenkins

FINDING OF THE COURT OF COMMON PLEAS

(Filed June 15, 1983)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

This day came on for consideration by the Court the two matters still pending, and the Court, being fully advised in the premises, finds:

(1) Motion for Summary Judgment on Count V -- The Court considers that the Judgment Entry, J. 540 P. 303, may have left unresolved the Motions for Summary

Judgment as to defendants Austintown Board of Education and Dr. James Baker. In order to resolve the same, the Court finds that there is no genuine issue as to any material fact with regard to Count V as to the defendants Austintown Board of Education and Dr. James Baker, and that such defendants are entitled to judgment as a matter of law. The Court finds that upon reviewing the evidence and in construing such evidence most strongly in favor of the plaintiff, reasonable minds can come to but one conclusion, and that conclusion is adverse to the plaintiff and in favor of the defendants. The Motions for Summary Judgment filed by such defendants are granted. Count V is dismissed.

"...." The second part of the Order is omitted; it is not on appeal.

PETITIONER'S PROPOSITIONS OF LAW ASSIGNED IN THE SUPREME COURT OF OHIO

Proposition of Law No. 1:

A board of education that disparately treats a teacher soley because the teacher has been assigned to the auxiliary services program violates equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 2, of the Ohio Constitution.

Proposition of Law No. 2:

A teacher who has, or should have had, a professional certificate but for the actions of the board of education is entitled to a continuing contract.

Proposition of Law No. 3:

As a holder of a professional teaching certificate and entitled to a continuing contract of employment, a

teacher is entitled to due process as embodied in the procedural requirements of Ohio Revised Code §3319.16 and the Austintown Board of Education policies.

Proposition of Law No. 4:

A teacher who holds a professional certificate has a property and liberty interest protected by the Ohio Constitution and the Fourteenth Amendment of the United States Constitution.

Proposition of Law No. 5:

By terminating a teacher's contract without just cause, Austintown violated Ohio Revised Code §4101.17 which prohibits age motivated firings.

PETITIONER'S ASSIGNMENTS OF ERROR

IN THE COURT OF APPEALS

1. The Court erred in granting defendant's motion for summary judgment on plaintiff's breach of Contract pursuant to Ohio Revised Code §3319.11 (continuing service status and contract) and a subsequent wrongful discharge pursuant to Ohio Revised Code §3319.16 (termination of contract by board of education without due process hearing).

2. The court erred in granting defendant's motion for summary judgment on plaintiff's cause of action alleging age discrimination pursuant to Ohio Revised Code §4101.17.

3. The court erred by granting defendants' motions for summary judgments in regards to Kathryn Shuba's deprivation

of equal protection and due process causes of action.

4. The court erred in granting summary judgment in Kathryn Shuba's cause of action which alleged that Mr. Valot and Dr. Baker conspired to deprive her of her constitutional rights.

5. The court erred in failing to grant a jury trial on the issues of age discrimination, deprivation of equal protection and due process rights, conspiracy to deprive appellant of her constitutional rights and excessive entanglement between Austintown Local Schools and the parochial schools pursuant to the United States Constitution First Amendment.

6. The court erred in granting summary judgment on plaintiff's cause of action alleging that the excessive

administrative and political entanglement between Austintown Local Schools and the parochial schools deprived appellant of her constitutional rights.

OHIO REVISED CODE §3317.06

Distribution of payments for special programs.

Moneys paid to school districts under division (P) of section 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes: ...

(G) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off of the nonpublic premises as determined by the department of education. If such services are provided in the public school or in public centers, transportation to and from such

facilities shall be provided by the school district in which the nonpublic school is located....

OHIO REVISED CODE §3319.11

Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, ...

OHIO REVISED CODE §3319.16

Termination of contract by board of education.

The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of

the board of education; or for other good and just cause. Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its treasurer of its intention to consider the termination of his contract with full specification of the grounds for such consideration. The board shall not proceed with formal action to terminate the contract until after the tenth day after receipt of the notice by the teacher. Within ten days after receipt of the notice from the treasurer of the board, the teacher may file with the treasurer a written demand for a hearing before the board or before a referee, and the board shall set a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the treasurer

shall give the teacher at least twenty days notice in writting of the time and place of the hearing....

OHIO REVISED CODE §3319.25

Professional certificates.

The state board of education may convert any provisional certificate or renewal thereof into a professional certificate of like type valid for eight years, provided the applicant has met the standards of preparation, experience, and teaching success set by the board for the conversion applied for.

NOTICE-TERMINATION OF CONTRACT

Rev. Code, Sec. 3319.11

OFFICE OF THE BOARD OF EDUCATION

of Austintown Local School District

225 Idaho Road

Youngstown, Ohio

April 23, 1979

To Mrs. Kathryn A. Shuba

3421 Bentwillow Lane

Youngstown, OH 44511

YOU ARE HEREBY NOTIFED that is is NOT the intention of this Board of Education to re-employ you at the expiration of your Limited Contract.

THE BOARD OF EDUCATION

/s/ John J. Dick, President

/s/ Robert R. Williams, Treasurer

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-692

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KATHRYN A. SHUBA,

Petitioner,

vs.

AUSTINTOWN LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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No. 85-692

SUPREME COURT OF THE UNITED STATES

October Term, 1985

KATHRYN A. SHUBA,
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BOARD OF EDUCATION,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Ohio Court of Appeals, Seventh Judicial District, not yet

officially reported, is fully presented in the Appendix of Respondent's Brief in Opposition at pp. A1-70.[1]

JURISDICTION

The claimed basis for jurisdiction appears in the Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional provisions and statutes cited by Petitioner, this case involves 28 U.S.C. §1257, Sections 3319.07 and 3319.08 of the Ohio Revised Code, and Rule 17.1(c) of the Rules of the Supreme Court of the United States,

---

1/ Respondent has included a copy of the opinion of the court of appeals in its Appendix because Petitioner failed to set forth the same in its entirety in her Petition.

which are fully set forth in the Appendix to this Brief[2]

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction over non-final judgments pursuant to 28 U.S.C. §1257?

2. Does this Court have jurisdiction to review a due process claim presented for the first time as error in a Petition for a Writ of Certiorari?

3. Does this Court have supervisory jurisdiction of a state court's deter-

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2/ Pursuant to Rule 21.1(f), Rules of the Supreme Court of the United States, the Appendix also contains verbatim copies of Sections 3319.11 and 3319.16 of the Ohio Revised Code, which Petitioner failed to set forth in their entirety in her Petition.

mination that a teacher did not have a property interest in continued employment when her teaching contract was nonrenewed in accordance with state law?

4. Should the Court "strictly scrutinize" a board of education's reasonably disparate treatment of regular classroom teachers and auxiliary services teachers in order to help Petitioner become tenured, regardless of her poor teaching performance?

COUNTERSTATEMENT OF THE CASE

Petitioner was a nontenured teacher employed by Respondent Austintown Local School District Board of Education (hereinafter "Board"). The present action arises from the Board's proper nonrenewal of petitioner's "limited" teaching contract

in April 1979 because of poor teaching performance.

Petitioner served in the Board's auxiliary services program, set up by the State of Ohio to provide parochial school students with remedial instruction on secular subjects such as reading, under a series of limited (nontenured) teaching contracts for the 1976-77, 1977-78 and 1978-79 school years. (Opinion of the Ohio Court of Appeals, Seventh Judicial District, at A5, hereinafter, "Opinion"). Like other teachers in the program, Petitioner taught in a mobile unit located away from public school premises (to be near to but not on nonpublic school property in compliance with this Court's pronouncement in Wolman v. Walter, 433 U.S. 229 (1977)), had her limited contract nonrenewed each spring because of the uncertainties of funding and

demand unique to the program, and was rehired in the fall once the Board knew that special program funds were available and the parochial school desired her particular teaching services for the next school year. (Opinion at A9)

During the course of her last one-year limited contract with the Board, Petitioner applied for and received (on October 19, 1978) a professional teaching certificate from the Ohio Department of Education, (Opinion at A20) making her eligible for continuing contract status (tenure) at the Board's next occasion to consider her reemployment -- in April 1979. R.C. §3319.11. Because of her eligibility for tenure and a poor performance evaluation by the parochial school principal, public school officials thoroughly evaluated Petitioner's teaching performance during

that school year. (Opinion at A12, 13) Since the evaluations revealed her deficient teaching performance, Petitioner was appropriately and timely notified that her limited teaching contract was nonrenewed. (Opinion at A13, 14) Thus, Petitioner never became tenured.

As set forth in the Petition for a Writ of Certiorari at pp. 6-8 ("Petition" hereinafter), Petitioner unsuccessfully presented this grievance, subsequently dressed in constitutional clothing, before the Ohio Courts. All claims presented were dismissed on the Board's motion for summary judgment, save the issue whether Respondent violated its collectively bargained nonrenewal policy in its nonrenewal of Petitioner. That issue was remanded to and is still pending before the Court of Common Pleas of Mahoning County, Ohio.

REASONS FOR DENYING THE WRIT

I. Introduction

Petitioner bears the burden of affirmatively establishing this Court's jurisdiction. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 70-71 (1948); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 651 (1942). Aside from conclusory allegations that the Board violated the Constitution, state laws and its own policies, and a plea that this Court rectify a "travesty of justice" (Petition at 32), Petitioner has failed to advance any compelling reason which allows or requires this Court to exercise its extraordinary and discretionary jurisdiction.

To the contrary, this Court lacks jurisdiction over the case pursuant to 28 U.S.C. §1257. Because the issue of the

Board's alleged breach of its negotiated nonrenewal policy is now pending before the state trial court, Petitioner has failed to satisfy the "final judgment" requirement of that statute. Further, it is clear that this Court may not review Petitioner's claim that the Board deprived her of a protected liberty interest by its allegedly willful concealment of a poor performance evaluation, for the claim was presented for the first time as error in the instant Petition.

In the event that jurisdiction is established, however, this Court should decline to review the case. The due process issues presented here are precluded by the state courts' determination under Ohio law that Petitioner did not hold a protected property interest in continued employment because she was not tenured when

her contract was nonrenewed. This Court lacks supervisory jurisdiction over the state courts' resolution of claims resolved wholly under state law. Moreover, the remaining equal protection claims raised here stem from Petitioner's personal grievance with the Board and are therefore not sufficiently important to warrant the Court's attention. Rule 17.1(c), Rules of the Supreme Court of the United States.

II. This Court Lacks Jurisdiction Over Non-Final Judgments.

Congress granted this Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," 28 U.S.C. §1257; O'Dell v. Espinoza, 456 U.S. 430 (1982), in order to prevent piecemeal reviews of state decisions, to avoid rendering advisory opinions and to delimit federal intrusions into state affairs. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

The Court has systematically applied this requirement of finality for federal appellate jurisdiction where the likelihood of fragmented review is great and excessive intrusion into state affairs may be

avoided. Flynt v. Ohio, 451 U.S. 619, 621-622 (1981); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). Further, the Court will only assume jurisdiction over a federal issue presented in a state case in which issues are still pending in the state courts in exceptional circumstances, e.g., when an important federal policy will erode without immediate Supreme Court intervention. O'Dell v. Espinoza, supra; Radio Station WOW, Inc. v. Johnson, supra.

Although the court of appeals affirmed the trial court's summary dismissal of Petitioner's due process and equal protection claims, it specifically remanded the contractual question of whether the Board violated its own negotiated policy when it nonrenewed Petitioner's limited teaching contract. Review of the

constitutional issues presented in this Petition would therefore promote rather than deter the type of fragmented, piecemeal review addressed by 28 U.S.C. §1257.

Moreover, this case simply does not involve issues that carry serious and irreparable public consequences which would justify a premature intrusion into the state courts' affairs. The case does not leave unanswered an important First Amendment issue, Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 247 n.6 (1974), nor would postponing review "seriously erode" a national policy such as that presented in Construction & General Laborers Union v. Curry, 371 U.S. 542, 550 (1963). In essence, this case concerns a disgruntled teacher's grievance, "[t]he resolution of

. . . [which] can await final judgment without any adverse effect upon important federal interests." Flynt v. Ohio, supra, at 622.

III. Question 2 Presented By Petitioner Was Not Raised As Error Below.

Petitioner raises for the first time as error the issue of whether the Board's allegedly willful concealment and use of a poor performance evaluation violated her due process rights (Petition at i), despite ample opportunity to timely raise any such claim. Indeed, Petitioner's Assignments of Error in the Court of Appeals at A 61-63 of the Petition and Petitioner's Propositions of Law Assigned in the Supreme Court of Ohio at A 59,60 of the Petition are totally silent as to any claim of error based on the Board's alleged concealment and use of such performance evaluation.

However, "[t]his Court has consistently refused to decide federal constitutional issues raised here for the first time on review of [a] state court decision." Cardinale v. Louisiana, 394 U.S. 437, 438-9 (1969). Accord, Carter v. Kentucky, 450 U.S. 288, 304 (1981); Sandstrom v. Montana, 442 U.S. 510, 527 (1979); Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 671 n.2 (1976); Tacon v. Arizona, 410 U.S. 351, 352 n.2 (1973); Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386, 394-5 (1964). The claim must therefore be dismissed for want of jurisdiction.

IV. This Court Lacks Supervisory Jurisdiction Over Petitioner's Due Process Claims, Which Were Resolved Under State Law.

Petitioner contends that her due process rights were violated when the Board nonrenewed her limited teaching contract for deficient teaching performance. Of course, these federal constitutional claims depend on her having enjoyed a property right in continued employment. Cleveland Bd. of Education v. Loudermill, 105 S.Ct. 1487, 1491 (1985); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972). Such a property right is created and otherwise defined by an external source such as state law, not the Constitution. Id. Consequently, the success of Petitioner's due process claims is entirely contingent upon a finding that she enjoyed a protected property interest established by Ohio law.

Ohio law empowers boards of education to hire public school teachers on a nontenured or tenured basis. R.C. §§3319.07, 3319.08. A teacher hired under a "limited" contract is nontenured, in that he is employed for a fixed term at the end of which he is subject to nonrenewal at the board's will (provided notice is given by April 30.) R.C. §3319.11. The board need not provide reasons for its decision, DeLong v. Board of Education, 36 Ohio St.2d 62 (1973); accord: Ryan v. Aurora City Board of Education, 540 F.2d 222 (6th Cir. 1976), cert. den., 429 U.S. 1041 (1977); Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), cert. den., 408 U.S. 943 (1972), nor need it follow statutory due process termination procedures to nonrenew a nontenured teacher's contract. Matheny v. Frontier Local Board of Education, 62 Ohio St.2d 362 (1980). On the other hand, a teacher hired

under a "continuing" contract is tenured, in that he is employed until he resigns or retires and may only be terminated for cause pursuant to statutory procedures. R.C. §§3319.08, 3319.16. Thus, while a tenured teacher in Ohio has a property right in continued employment, "a non-tenured teacher has no expectancy of continued employment past the term of his limited contract." Matheny v. Frontier Local Board of Education, supra, at 364. Accord, DeLong v. Board of Education, supra, at 64 (1973).

A teacher becomes eligible for tenure when he has: 1) taught three of the last five years in the school district; and 2) "holds" a qualifying teaching certificate. R.C. §3319.11. In this regard, the teacher is eligible for tenure only if he actually holds a certificate qualifying him for

tenure at the time the Board rehires him. R.C. §3319.08; State ex rel. Peet v. Westerville City School Dist. Bd. of Education, 66 Ohio St.2d 287 (1981); State ex rel. Gandy v. Board of Education, 26 Ohio St.2d 115 (1971).

Mere eligibility for tenure in no way means entitlement to tenure, however. Once the teacher becomes eligible, a board has the option not to rehire him, to rehire him on a probationary basis, or to grant a continuing contract. R.C. §3319.11; State ex rel. Hura v. Board of Education, 51 Ohio St.2d 19, 21-22 (1977). Thus, a teacher becomes tenured only when a board of education reemploys him without qualification at a time when the teacher has met both eligibility requirements for such status (that is, has taught for three of the previous five years and holds a

qualifying teaching certificate). State ex rel. Garay v. Hubbard Local School Dist. Bd. of Education, 11 Ohio St.3d 20 (1984); State ex rel. Voss v. Northwest Local Bd. of Education, 66 Ohio St.2d 274 (1981).

After a thorough review of Ohio law, the appellate court found that Petitioner did not hold a qualifying teaching certificate when the Board reemployed her under a one year contract for the 1978-1979 school year and was therefore ineligible for tenure until the next occasion (in April) that the Board might rehire her without qualification. (Opinion at A21, 22) Because Petitioner's teaching performance was poor, however, the Board properly exercised its option to nonrenew her in accordance with R.C. §3319.11. (Opinion at id.) Petitioner thus never became tenured.

Since a nontenured teacher has no expectancy of continued employment past the term of his limited contract, Matheny v. Frontier Local Board of Education, supra, no property right was implicated. (Opinion at A2) Accordingly, the court found that the Board was not required by Ohio law to provide Petitioner with reasons for the nonrenewal or to afford her the due process termination procedures contained in R.C. §3319.16, (Opinion at A23) and dismissed her constitutional due process claims.

This Court has repeatedly found the state courts to be "the ultimate expositors of state law," Mullaney v. Wilbur, 421 U.S. 684, 692 (1975), citing Murdock v. City of Memphis, 20 Wall. 590 (1875); and Winters v. New York, 333 U.S. 507 (1948), accorded "respectful consideration and great weight to the views of the state's highest court

on matters of state law," California Retail Liquor Dealers Asso. v. Midcal Aluminum, Inc., 445 U.S. 97, 112 (1980), quoting Indiana ex rel. Anderson v. Brand, 303 U.S. 95,100 (1938), and accepted the factual findings of state courts in the absence of "exceptional circumstances." California Retail Liquor Dealers Asso. v. Midcal Aluminum, Inc., supra at id, quoting Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952); see e.g. Radio Station WOW, Inc. v. Johnson, supra at 129 (Exceptional circumstances warranting Supreme Court review of state court interpretation of state law exist when it appears to be an "obvious subterfuge to evade consideration of a federal issue").

In fact, the Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge

federal rights." Herb v. Pitcairn, 324 U.S. 117, 125-6 (1945). However, the Court will not correct a state court's views of federal laws where the state court would render the same judgment once corrected, since the review "could amount to nothing more than an advisory opinion." Herb v. Pitcairn, supra at 126.

Because the Ohio appellate court correctly determined that Ohio law did not confer a protected property interest in continued employment on Petitioner, this Court's review of Petitioner's due process claims would be advisory and would unduly interfere with that court's construction and application of Ohio law. Moreover, there has been no attempt here to avoid important federal issues that would warrant this Court's intervention. The Ohio courts have merely followed settled law that the

success of a federal due process claim arising under the Fourteenth Amendment depends upon the existence of a state-created property interest. Cleveland Bd. of Education v. Loudermill, supra; Board of Regents v. Roth, supra. In the interest of promoting federalism and to avoid rendering an advisory opinion, the Court should defer to the Ohio court's disposition of Petitioner's due process claims.

V. Petitioner's Equal Protection Claims Are Not Sufficiently Important To Warrant This Court's Attention.

Petitioner does not claim that she has been discriminated against because of her race, alienage, ancestry, or gender. Nor does she claim that her status as an auxiliary services teacher deprives her of the fundamental rights to vote or to travel interstate. See, e.g., Massachusetts Bd.

of Retirement v. Murgia, 427 U.S. 307, 313 nn. 3, 4 (1976). Rather, she urges in conclusory form that she would have been granted tenure if she had been employed as a regular public school classroom teacher.

The Equal Protection Clause, however, does not require that all persons be treated similarly under all circumstances. Legislatures and other public bodies often need to make legitimate distinctions. Except in cases where different treatment affects a "suspect classification," impairs a "fundamental right," or otherwise involves an interest so important as to call for some kind of "heightened scrutiny," the Court merely requires a public body such as the Board to have a rational basis for its distinctions. Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959). Because auxiliary services

teachers as a class and the unqualified right to teach regardless of competency are not even arguably encompassed by any of the Court's narrowly defined "suspect classifications," "fundamental rights" or "important rights" calling for heightened scrutiny, the Court's rational basis test applies. (Opinion at A38)

The appellate court correctly found that the Board had a rational basis for treating regular public school classroom teachers and auxiliary services teachers differently because of the physical realities of the auxiliary services program and the program's unique funding and demand uncertainties. (Opinion at A45) First, because auxiliary services teachers must teach near but not on non-public school students, often in mobile units located away from public school premises, Wolman v.

Walter, supra, public school principals are not direct supervisors in a position to evaluate them. Consequently, it is reasonable that some other properly qualified public school official, for example, the public schools' Director of instruction, evaluate auxiliary services teachers. (Opinion at A49, 50) Purely as a matter of physical distance, board policies are not as accessible to auxiliary services teachers. However, it is reasonable that they be made readily available upon a teacher's request. Second, tentative funding for the program, along with the non-public school's instrumental input in the yearly demand for auxiliary services, makes it reasonable that auxiliary service teachers' one-year limited contracts be nonrenewed each year. (Opinion at A46, 47) Accordingly, the appellate court properly dismissed Petitioner's Equal Protection claims.

Petitioner was treated equally with respect to other auxiliary services teachers. She was denied tenure because she was not a good teacher, not because of her status as an auxiliary services teacher. (Opinion at 47) Her Equal Protection claims spring wholly from her disagreement with the Board's assessment of her teaching performance. While no doubt of great personal importance, Petitioner's grievance is simply not important enough to warrant this Court's attention. Rule 17.1(c), Rules of the Supreme Court of the United States.

CONCLUSION

For the reasons set forth herein, Respondent respectfully submits that the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS

(Dated January 25, 1985)

Case No. 83 C.A. 81

IN THE COURT OF APPEALS

SEVENTH JUDICIAL DISTRICT

* * * *

KATHRYN A. SHUBA

Plaintiff / Appellant

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant / Appellee

* * * *

Appeal From Judgment Entered in the Common Pleas Court County of Mahoning, Ohio Case No. 80 CV 1712

DECISION AND JOURNAL ENTRY

SYLLABUS

1. When a limited contract teacher, who holds a provisional teaching certificate and would be eligible for a continuing contract

if his or her contract was renewed for another year, is notified by the board of education prior to April 30 that his or her limited contract would not be renewed and subsequently such teacher is reemployed for the following year by such board of education with a limited contract, such teacher is not entitled to a continuing contract.

2. Non-tenured teacher has no expectancy of continued employment past the term of his or her employment; therefore, there is no property right involved.

3. Judicial review in actions of school authorities involving administration of state teacher tenure is usually in state court, not federal court.

4. Necessity for statement of reasons for nonrenewal of nontenured teachers' employment contracts, and adequacy or accuracy of such statements, are matters of state law, not federal constitutional law.

5. The attorney fee provision of 42 U.S.C. Section 1988 is part of the Section 1983 remedy whether the action is brought in a federal or state court.

6. Prevailing defendant is to be awarded attorney fees pursuant to 42 U.S.C. Section 1988 only when the court, in the exercise of its discretion, has found that the plaintiff's action was frivolous, unreasonable or without foundation.

LYNCH, J. Retired.

Plaintiff is appealing all the judgments of the Common Pleas Court in this case which sustained the various motions of defendants for summary judgments. Such a motion, as to Count I of plaintiff's Complaint, was sustained by the trial court by a Judgment Entry dated February 8, 1982. As to Counts II, III and IV of plaintiff's Complaint, such

a motion was sustained by the trial court by a Judgment Entry dated September 13, 1982. As to Count V, which was included in plaintiff's Amended Complaint, which was filed August 9, 1982, such a motion was sustained by the trial court by a Judgment Entry dated June 15, 1983.

The record in this case is voluminous and consists of two volumes of the transcript of the pleadings and original papers with 121 items which include, among other things, several affidavits. In addition thereto, there are depositions of all the pertinent parties and non-parties in this case which total approximately 800 pages.

Most of the pertinent facts of this case are undisputed. However, there are some disputed facts which will be pointed out in this opinion together with the source of such facts.

Plaintiff was employed by defendant Board of Education as a teacher of remedial reading under the auxiliary services program in the Immaculate Heart of Mary Parochial School for the school years 1974-75, 1976-77, 1977-78 and 1978-79, under a series of one-year limited contracts. Her services with defendant Board of Education were terminated at the end of the 1978-79 school year.

Plaintiff's employment history with defendant Board of Education is intertwined with the history of federal court litigation over the constitutionality of state aid to nonpublic school students. Prior to plaintiff's employment, Ohio's "Auxiliary Services" educational program was unsuccessfully challenged in 1974 by citizens and taxpayers on First Amendment grounds. Wolman v. Essex, Case No. 73-292 (S.D. Ohio 1974).

The Wolman case was appealed to the United States Supreme Court which vacated the judgment of the District Court and remanded the case for further consideration in light of Meek v. Pittinger (1975), 421 U.S. 349. Wolman v. Essex (1975), 421 U.S. 982.

The Ohio General Assembly then repealed the existing Auxiliary Services program effective August 29, 1975 (136 Ohio Laws 524) and enacted a new Auxiliary Services program to cure the constitutional defects. This statute was also challenged. On June 21, 1976, a three judge district court panel held the newly enacted Auxiliary Services program constitutional in all respects. Wolman v. Essex (1976), 417 F. Supp. 1113 (S.D. Ohio). This decision was appealed.

On July 24, 1977, the United States Supreme Court upheld the Auxiliary Services program because the teachers had to be employed by the public school board or by the

State Department of Health and had to provide the services "in public schools, in public centers, or in mobile units located off the nonpublic school premises." Wolman v. Essex (1977), 433 U.S. 233, 244-248. R.C. 3317.06(G).

Plaintiff graduated from Youngstown State University in 1972 and did substitute teaching for the following two school years. Upon the recommendation of the principal of Immaculate Heart of Mary Parochial School, plaintiff was initially employed by defendant Board of Education for the 1974-75 school year under the auxiliary services program. She taught in Immaculate Heart of Mary School Building and was supervised by the principal of such school.

Because of the United States Supreme Court decisions on governmental aid to religious schools, there was no state funds for the 1975-76 school year and the Catholic

Diocese of Youngstown hired plaintiff to continue teaching remedial reading at Immaculate Heart of Mary School for the 1975-76 school year.

Since the constitutionality of the newly enacted state laws on auxiliary services was upheld by the United States District Court in June 1976, state funds became available for auxiliary services and plaintiff was hired by defendant Board of Education for the 1976-77 school year.

Under the auxiliary services program, of which the state is the only source of funding, the State of Ohio requires public school districts to provide certain services including remedial reading and supplies to nonpublic students. R.C. Sections 3317.024(P) and 3317.06.

The guidelines for the implementation of applicable statutory provisions providing services and materials to pupils attending

nonpublic schools, which were issued by the Ohio Department of Education, state that the public school district shall provide the delineated educational services and materials pursuant to applications submitted jointly by the administrative head of the nonpublic school and a parent (of a nonpublic school pupil) representative from each nonpublic school within the district.

Since it was the prerogative of each parochial school to determine the specific auxiliary services it desired, each school year and state funds were the only source for such program, defendant Board of Education nonrenewed the limited contracts of auxiliary services teachers in April of each year. This procedure was applied to plaintiff. If the auxiliary services funds were available and the parochial school requested the particular services for the next school year, defendant Board re-employed the auxiliary

services teacher. In this manner, defendant rehired plaintiff for the 1976-77, 1977-78 and 1978-79 school years upon the recommendation of the school principal of Immaculate Heart of Mary Parochial School.

It was the policy of defendant Board of Education to evaluate every teacher, who would become eligible for a continuing contract at the end of a particular school year, during the school year prior to such eligibility and that such evaluation would be done by the principal of the school at which such teacher taught. Pursuant to such policy, defendant Valot, the Superintendent of defendant Board of Education, met with Sister Mary deAngelis, principal of Immaculate Heart of Mary Parochial School in March 1978 and requested her to evaluate plaintiff. However, such principal declined to do so because the Youngstown Catholic Diocese took the position that, pursuant to

the law, auxiliary service teachers were public employees and should be evaluated by the administrative personnel of the school district which employed them.

By letter dated May 25, 1978, to valot, Sister Mary deAngelis, stated, in pertinent part, as follows:

> "Mrs. Kathryn Shuba wishes to apply for tenure with the Austintown Board of Education as a remedial reading teacher and has asked me to write my recommendation in this regard.
>
> "* * * I have known Mrs. Shuba for the past two years and have observed the work she has done in remedial reading during this time. Although I had planned to rehire her for the next school year, I would not recommend her for tenure for the following reasons:
>
> "-Her work with the students is only fair and she is weak in discipline even with the small groups
>
> "-State funds for rehiring special teachers are not that certain from year to year as we have experienced in the past

> "-The needs of the school in the future may be such that the money might be used better for other services such as an LD Tutor.
>
> "Because of the above circumstances I highly discourage tenure for Mrs. Shuba. It is my understanding that the above recommendation will be kept confidential."

LD Tutor in the above letter means Learning Disabilities.

Because of the request of Sister Mary deAngelis, that the contents of the above letter be kept confidential, defendant Valot did not inform plaintiff of such letter.

Since plaintiff was not being supervised by any public school principal, defendant Valot arranged with defendant, Dr. James H. Baker, Director of Instruction of defendant, Board of Education, to evaluate plaintiff. At Dr. Baker's invitation, plaintiff attended an in-service evaluation workshop on August 28, 1978 for all teachers that were going to be evaluated during the 1978-79 school year.

At this workshop, the entire evaluation policy consisting of microteacher approach as well as the target approach and the procedures one would follow during the evaluation process was reviewed.

In September 1978, Dr. Baker telephoned plaintiff and advised her that he was going to visit her van for purposes of observing her teaching and to have a conference with her about her teaching and the evaluation approaches that he intended to follow. Dr. Baker made approximately eight observations of plaintiff's teaching. Based on his evaluations of plaintiff, defendant Dr. Baker recommended to defendant Mr. Valot that plaintiff's teaching contract be nonrenewed because of her poor performance as a teacher.

Defendant Mr. Valot agreed with Dr. Baker and recommended in conjunction with the county superintendent, to defendant Board of Education that plaintiff's teacher contract

be nonrenewed. Defendant Board of Education followed such recommendation.

By notice, dated April 23, 1979, defendant Board of Education notified plaintiff that it was not the intention of defendant Board of Education to reemploy plaintiff at the expiration of her Limited Teacher's Contract.

Pursuant to a policy of defendant Board of Education, plaintiff conferred twice with Mr. Valot in May 1979 concerning her nonrenewal once with plaintiff alone and once with plaintiff and Mr. Donald H. Evans, president of the Austintown Education Association. Plaintiff then asked to be heard by defendant Board of Education. Defendant Board of Education granted her request and permitted plaintiff to be heard at their June 1, 1979 meeting in executive session at which plaintiff appeared with Mr. Evans and Attorney David Roloff, whose

assistance was obtained for plaintiff by Mr. Evans through the Ohio Educational Association. This meeting did not change defendant Board of Education's nonrenewal of plaintiff's contract.

Plaintiff became dissatisfied with the services of Attorney Roloff and she retained the services of Attorney Judith A. Nicely of Akron, Ohio, who filed the complaint in this case on September 26, 1980.

Defendant Board of Education filed a motion for attorney fees pursuant to 42 U.S.C. Section 1988, which was overruled by the trial court. Defendant Board of Education filed an appeal on this judgment of the trial court.

Plaintiff's first assignment of error is that the trial court erred in granting defendants' motion for summary judgment on plaintiff's Breach of Contract pursuant to Ohio Revised Code 3319.11 (continuing service

status and contract) and a subsequent wrongful discharge pursuant to Ohio Revised Code 3319.16 (termination of contract by Board of Education without due process hearing).

This assignment of error is Count I in plaintiff's complaint.

> R.C. 3319.11 provides, in pertinent part, as follows:
>
> "Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, * * *."

Plaintiff contends that she was eligible for a continuing contract when she was rehired for the 1978-79 school year.

In State, ex rel. Gray v. Hubbard Local School District Board of Education (1984), 11 Ohio St. 3d 20, 11 OBR 53, the court stated, in pertinent part, as follows:

> "In construing R.C. 3319.11 in State, ex rel. Voss, v. Bd. of

Edn. (1981), 66 Ohio St. 2d 274, 276 (20 O.O. 3d 267), this court stated:

"'A person is eligible for a continuing contract under R.C. 3319.11 if he is (1) a teacher, (2) holds a professional, permanent or life certificate, and (3) has taught for at least three of the last five years in the district.' * * *.

"Appellant contends that even if appellee would be eligible for a continuing contract, she was given written notification of the board's intention not to reemploy her before the thirtieth day of April and, therefore, was not entitled to a continuing contract.

"In State, ex rel. Voss, v. Bd. of Edn., supra, at 276, this court stated, '(a) person * * * eligible (for a continuing contract) can either (1) be denied a contract, (2) be issued a limited contract of up to two years if it is accompanied by written notice containing recommendations regarding professional improvement, or (3) be granted a continuing contract.'

"This court has held that reemployment pursuant to R.C. 3319.11 is a right subject to termination by proper notification. State, ex rel.

Brown, v. Bd. of Edn, (1955), 162 Ohio St. 589 (55 O.O. 481); State, ex rel. Peake, v. Bd. of Edn. (1975), 44 Ohio St. 2d 119 (73 O.O. 2d 437); Otterson v. Bd. of Edn. (1975), 44 Ohio St. 2d 123 (73 O.O. 2d 439)."

In instant case, it was established that plaintiff was a teacher and had taught for at least three years in the district. One of the issues in this case was whether she held a professional certificate at the time of her re-employment on August 28, 1978.

R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year.

Plaintiff contends that when she signed her contract with defendant Board of Education on August 28, 1978, for the 1978-79 school year, she had given notice of her application and eligibility for tenure prior to signing the contract.

When plaintiff was rehired by defendant Board of Education on August 28, 1978, for

the 1978-79 school year, she had a provisional teaching certificate. However, on June 23, 1978, plaintiff filed her application and credentials for a professional teacher's certificate to the Mahoning County Board of Education for submission to the State Board of Education.

Section 3301-21-09(c)(1) of the Ohio Administrative Code provides, in pertinent part, that an applicant for a professional teacher's certificate must be employed full-time in the schools of Ohio at the time of application.

Since plaintiff's employment with defendant had been terminated at the end of the 1977-78 school year, the superintendent of the Mahoning County Board of Education did not forward plaintiff's application for a professional teacher's certificate to the State Board of Education until plaintiff's re-employment for defendant Board on August

28, 1978. The State Board of Education issued a professional teacher certificate on October 19, 1978, for the period from July 1, 1978 through June 30, 1986.

Plaintiff contends that she had a professional teacher certificate on August 28, 1978 on the basis of the language on her professional teacher certificate. Defendant Board contends that a teacher desiring a continuing contract must have his or her professional teacher certificate by the preceding April 30 when limited contracts have to be renewed or nonrenewed.

Defendant Board of Education attached to its Motion for Summary Judgment, dated September 14, 1981, the affidavit of Martha F. Dimit, Assistant Director of the Division of Teacher Education and Certification, Ohio Department of Education, which consisted of eight pages. The pertinent part of such affidavit is as follows:

> "23. On July 1, 1976, the Division of Teacher Education and Certification implemented a procedure whereby all teacher's certificates are given an effective date of July 1 in the school year they are issued, regardless of the date of issuance of the certificate. Prior to July 1, 1976, all teacher's certificates were given an effective date of September 1 in the school year they were issued. The current July 1 date is assigned to all certificates for administrative convenience only so that there is a uniform expiration date of June 30 on all certificates. The date of issuance is separately noted on each teaching certificate issued by the Division." (Emphasis added.)

Prior to April 30, 1978, plaintiff was notified by defendant Board of Education that it was not its intention to reemploy plaintiff at the expiration of her Limited Teacher's contract.

The established case law is that under the facts of instant case, plaintiff was not entitled to a continuing contract because her

employment had been terminated by defendant Board of Education at the expiration of plaintiff's Limited Teacher's contract for the 1977-78 school year. State, ex rel. Hura v. Board of Education (1977), 51 Ohio St. 2d 19; State, ex rel. Paul v. Board of Education (1975), 44 Ohio St. 2d 5; Pascoe v. Board of Education (Feb. 18, 1983) Erie County Case No. E-82-32 (Unreported, Ct. App. 6th District) m.c.o. May 25, 1983.

We agree with the above cited cases and hold that plaintiff was not entitled to a continuing contract on her reemployment in August 1978 under the facts of this case.

Plaintiff, in her brief and assignments of error which was filed September 6, 1983, raised the issue that tenured teachers have a right to receive notice of the reasons for their terminations and a right to a hearing on such terminations pursuant to R.C. 3319.16. Since we have determined that

plaintiff had not obtained tenure, we hold that R.C. 3319.16 does not apply to plaintiff's termination.

The answer brief of defendant Board of Education, on page 26, referred to Struthers City Schools Bd. of Edn. v. Struthers Edn. Ass'n. (1983), 6 Ohio St. 3d 308, 60 BR 368. Plaintiff, in her reply brief, for the first time cited the Struthers City Schools Bd. of Edn. case as well as Tracy v. Otsego Bd. of Edn. (1983), 6 Ohio St. 3d 305, 60 BR 366. Both of these cases were decided on August 31, 1983.

The syllabus of the Struthers City Schools Bd. of Edn. case, which was decided by a 4 to 3 vote, is as follows:

> "Contractually created procedural requirements relating to the nonrenewal of teachers' limited employment contracts, contained in collective bargaining agreements and arrived at through open negotiations, are enforceable so long as the procedures do not directly conflict with R.C. 3319.11.

> (Dayton Teachers Assn. v. Dayton Bd. of Edn., 41 Ohio St. 2d 127 (70 O.O. 2d 223), approved and followed.)"

In the Struthers City Schools Bd. of Edn. case, the court upheld the provisions in its collective bargaining agreement providing for fair practice and dismissal standards which required written notice to limited contract teachers of the reasons upon which the Board of Education made its decision not to renew and a post-termination hearing with the Board of Education at which time the teacher would be afforded the opportunity to refute such charges and to cross-examine witnesses.

The Teacher Contract Non-Renewal Policy of the Austintown Local Schools, which was adopted March 18, 1974, provides, in pertinent part, as follows:

> "The Board of Education and the Austintown Education Association recognize that it is the responsibility and duty of the Board to follow a policy which will employ and retain the best qualified teachers, in order to

improve and maintain the quality of instruction. The following Policy shall, in no way, limit or deny this responsibility of the Board.

"A teacher under limited contract shall be notified by the Board, in writing by April 30th, of the Board's intent not to re-employ. A teacher so notified will be advised of the cause for such a decision. Unless the teacher so notified within ten (10) days subsequent to the receipt of such notice requests, in writing, an opportunity to appear and offer reasons against such intent, the Board may proceed with formal action.

"Any teacher so notified, upon request, shall be granted a conference with the Superintendent. After the conference, a teacher with three (3) or more years experience may request within ten (10) days, in writing, a hearing before the Board. The Board shall then set a time for the hearing within the thirty (30) days from the date of said request, and the Superintendent shall give the teacher at least fifteen (15) days notice, in writing, of the time and place of said hearing. No hearing shall be held during the summer vacation, without the teacher's consent. Such hearing shall be private.

Defendant Board contends that the Struthers City Schools Bd. of Edn. does not apply to this case because there was no collective bargaining agreement between defendant Board and the Austintown Education Association as there was in the Struthers case. There was no written master collective bargaining agreement between Austintown Education Association and defendant Board, but the Teacher Contract Nonrenewal Policy of Austintown Local Schools as set out in its handbook was negotiated between the Austintown Education Association and defendant Board. (Deposition of Donald H. Evans, pages 19-21, 33-34). We hold that the Teacher Contract Nonrenewal Policy of Austintown Local Schools represents a collective bargaining agreement between Austintown Education Association and defendant Board.

Defendant Board points out that the above mentioned policy of defendant states as follows: "The following policy shall, in no way, limit or deny this responsibility of the Board" to employ and retain the best qualified teachers.

In Tracy v. Otsego Bd. of Education (1983), 6 Ohio St. 3d 305, 60 BR 367, 453 NE 2d 610, in a unanimous decision, the court held that a collective bargaining agreement, which merely requires the board to notify teachers in writing of the reason for nonrenewal when such teachers have been employed by the school system for 5 years or more, does not restrict the board's continued right to nonrenewal for any reason it deems necessary and is not in conflict with R.C. 3319.11.

Pursuant to the Tracy case, we hold that the above mentioned provisions in subject policy statement of defendant Board does not

affect plaintiff's right to a notice by defendant Board of the reason for nonrenewal pursuant to subject policy agreement on non-renewal of limited contract teachers.

The facts in the record of this case are in conflict as to whether plaintiff was advised by defendant Board of Education of the reason for its nonrenewal of her teacher's contract on April 23, 1979 and whether she was permitted to have witnesses testify at the June 1, 1979 meeting of defendant Board of Education.

Plaintiff, in her deposition, stated that defendant Board of Education did not inform her of the reasons of the termination of her employment and did not allow the 19 parents of children, that plaintiff taught, and who had come to testify on behalf of plaintiff, at the June 1, 1979 meeting of defendant Board.

Defendant Valot, in his August 18, 1981 affidavit and his deposition, stated that defendant Board was not required to give plaintiff a reason for non-renewal of limited teacher contracts; that, as a matter of policy, limited contract teachers were usually informed as to the reason of their non-renewal; that plaintiff was nonrenewed because of her poor performance as a teacher; that both plaintiff and Mr. Evans were aware that the reason of her non-renewal was Dr. Baker's evaluation of her performance as a teacher; that plaintiff was furnished a copy of Dr. Baker's evaluation of her; that plaintiff never asked him specifically what the reasons were for her nonrenewal; that at the June 1, 1979 meeting of defendant Board, Attorney Roloff, who represented plaintiff, did most of the talking on behalf of plaintiff; that Attorney Roloff argued that the evaluation of plaintiff by Dr. Baker was

unfair; that plaintiff should be given a second chance with a one-year limited "probationary" contract; that someone other than Dr. Baker should evaluate her the next year; that Attorney Roloff did not urge defendant Board to grant plaintiff a continuing contract and did not request that plaintiff's witnesses be permitted to testify, and that at the conclusion of such meeting Mr. Evans asked plaintiff if she felt that she had a fair hearing to which she replied that she felt that she had a fair hearing.

The Struthers City Schools Bd. of Edn. case overruled a unanimous decision of this court dated March 24, 1984, in which we held that a board of education was not required to give a nontenured teacher the reason for nonrenewal of a limited teaching contract, as well as a hearing, even though their collective bargaining agreement provided for

such procedure on the authority of Ryan v. Aurora City Bd. of Ed. (1976), 540 F. 2d 222, 223. Therefore, we hold that the belief of defendants and their counsel that they were not required to give plaintiff a reason for nonrenewal of her limited contract was not unreasonable or arbitrary.

We feel that there is a serious question as to whether plaintiff can prevail on the merits of this case, but this appeal is before us on a summary judgment rather than on the trial of this case. Civil Rule 56 provides that the evidence in a summary judgment must be construed most strongly in favor of the adverse party. Therefore, we hold that there is merit in this assignment of error as to the factual questions as to whether plaintiff was advised by defendant Board of Education of the reason for its nonrenewal of her teacher's contract on April 23, 1979 and whether she was permitted to

have witnesses testify at the June 1, 1979 meeting of defendant Board of Education.

Plaintiff's second assignment of error is that the trial court erred in granting defendants' Motion for Summary Judgment on plaintiff's cause of action alleging age discrimination pursuant to Ohio Revised Code 4101.17.

This assignment of error is Count II in plaintiff's complaint.

R.C. 4101.17(A) provides as follows:

> "No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee between the ages of forty and seventy who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee."

The syllabus of Barker v. Scovill, Inc. (1983), 6 Ohio St. 3d 146, 6 OBR 202, 451 N.E. 2d 807, is as follows:

> "1. In order to establish a prima facie case of age discrimination, violative of R.C. 4101.17, in an employment

> discharge action, plaintiff-employee must demonstrate (1) that he was a member of the statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class. Defendant-employer may then overcome the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for plaintiff's discharge. Finally, plaintiff must be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination.
>
> "2. Within the context of R.C. 4101.17, 'just cause' for discharge is established if plaintiff was terminated for reasons other than those explicitly prohibited by the statute."

A review of the entire record established that plaintiff satisfied the existence of numbers 1 and 2 of the requirements for a prima facie case for age discrimination pursuant to the Barker case. As to requirement No. 4, plaintiff's brief states

that Laura Hartshorn, her replacement at Immaculate Heart of Mary, was under 40 years of age, but there is nothing in the record of this case to establish this fact.

Defendants' evidence was that their termination of plaintiff was based on their evaluation that plaintiff's performance as a teacher was poor and that her age had nothing to do with plaintiff's discharge. Plaintiff did not produce evidence to show that the reason given by defendants for their termination of her employment was a pretext for unlawful discrimination.

Therefore, we overrule plaintiff's second assignment of error.

Plaintiff's third and fourth assignments of error are as follows:

> 3. The court erred by granting defendants' motions for summary judgments in regards to Kathryn Shuba's deprivation of equal protection and due process causes of action.

4. The court erred in granting summary judgment in plaintiff's cause of action which alleged that Mr. Valot and Dr. Baker conspired to deprive her of her constitutional rights.

Plaintiff's third assignment of error is Count III in plaintiff's complaint and her fourth assignment of error is Count IV in plaintiff's complaint. We will discuss these assignments of error together because they are interrelated. The actions of defendants, Mr. Valot and Dr. Baker, which were done in the performance of the duties of the positions they held with defendant Board, are the basis for both assignments of error.

Plaintiff alleges, pursuant to Title 22 of the United States Code, Sections 1983 and 1985 (3), that she has been deprived of "* * * rights, privileges and immunities secured by the constitutional laws of the United States * * *" by actions of defendants, Mr. Valot and Dr. Baker, under color of law by discriminating against plaintiff by segregating her in a parochial school.

Section 1983 of Title 22 of the United States Code provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. ***."

Section 1985 of Title 22 of the United States Code provides, in pertinent part, as follows:

> "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under

the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

We have set out the entire context of Section 1985(3) of Title 22 because we do not think that any part of the above quoted language applies to the facts of this case.

The facts in this case are not included in a "suspect classification" or impair a fundamental right. "Suspect Classifications" include those based on alienage, race or ancestry. "Fundamental rights" include the right to vote and for interstate travel. Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, 312 n. 3 and 4.

Under the facts of this case, we hold that the "rational basis" test is applicable. In Bd. of Edn. v. Walter (1979), 58 Ohio St. 2d 368, the court, at page 376, stated as follows:

> "Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any

> classification based 'upon a state of facts that reasonably can be conceived to constitute a distinction, or differences in state policy * * *' will be upheld. Allied Stores of Ohio v. Bowers (1959), 358 U.S. 522, 530.
>
> "This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt. Paragraph one of the syllabus in State, ex rel. Dickman, v. Defenbacher (1955), 164 Ohio St. 142, states:
>
> "'An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'
>
> "It is against this standard that we must determine if a violation of the Equal Protection and Benefit Clause exists here."

We have previously held in this opinion that plaintiff did not have a continuing contract with defendant Board. In Matheny v.

Bd. of Edn. (1980), 62 Ohio St. 2d 362, the court, on page 364, stated, in pertinent part, as follows:

> "We hold that under the provisions of R.C. Chapter 3319, a non-tenured teacher has no expectancy of continued employment past the term of his limited contract. Therefore, there is no property right involved here as claimed by appellants."
>
> In accord: DePas v. Board of Edn. (1977), 52 Ohio St. 2d 193.

Pertinent headnotes of Ryan v. Aurora City Bd. of Education (1976, 6th Cir), 540 F. 2d 222 Cert denied; 429 U.S. 1041 (1977), are as follows:

> "2. Civil Rights Act of 1871 was never intended as catchall statute under which myriads of suits, traditionally within exclusive jurisdiction of state courts, might be filed in federal courts in absence of showing of deprivation of constitutional right. 42 U.S.C.A. Sec. 1983; U.S.C.A. Const. Amend. 14.

"3. Judicial review in actions of school authorities involving administration of state teacher tenure laws is in state court, not federal courts, with exception of cases involving teachers' constitutional rights of free speech, self-incrimination, equal protection and due process. U.S.C.A. Const. Amends. 1, 5, 14.

" * * *.

"5. Nontenured teacher had no expectancy of continued employment, whatever might be policies of institution, where there existed statutory tenure system; since property interests were created by state law and not Constitution, fact that state limited guarantee to only tenured teachers necessarily negatived any property interest. R.C. Ohio Secs. 3319.08, 3319.11, 3319.16; U.S.C.A. Const. Amends. 1, 5, 14; 42 U.S.C.A. Sec. 1983.

" * * *.

"8. Necessity for statement of reasons for nonrenewal of nontenured teachers' employment contracts, and adequacy or accuracy of such statements, are matters of state law, not federal constitutional law."

> In accord: Bishop v. Wood (1976), 426 U.S. 341; Orr v. Trintor (1971 - 6th Cir) 444 F. 2d 128; Cert. denied; 408 U.S. 942 (1972) reh. denied 409 U.S. 943 (1972).

In Great American Federal Savings & Loan Ass'n. v. Novotny (1979), 442 U.S. 366, the court held, in pertinent part, as follows:

> "Section 1985 (3) * * * creats no substantive rights itself but is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right -- to equal protection of the laws or equal privileges and immunities under the laws -- is breached by a conspiracy in the manner defined by the section."
>
> See United Brotherhood of Carpenters and Joiners of America v. Scott (1983) _____ U.S. _____, 77 L. Ed 2d 1049.

The constitutionality of the auxiliary services program was under attack in federal courts at the beginning of plaintiff's employment with defendant Board. This issue was uncertain until July 24, 1977 when the constitutionality of this program was upheld

in Wolman v. Essex (1977), 433 U.S. 233. However, because of said case, defendant Board had to provide such auxiliary services in mobile units located off the nonpublic school premises. Wolman v. Essex (1977), 433 U.S. 233, 244-48; R.C. 3317.06(G). Because of this, such auxiliary services teacher did not have a public school principal supervising them as was the case with public school teachers and they were isolated from other public school teachers because they had to teach in a mobile van near the parochial school where they were teaching. Also, parochial school principals have discretion annually as to how they will use available auxiliary service funds.

17 Ohio Jurisprudence 3d 153-155, Constitutional Law, Section 630, states as follows:

> "Neither the state nor federal constitutional provisions guaranteeing equal protection of the laws deprives the Ohio

General Assembly of a broad power of classification and differentiation of persons and subject matter in legislative enactments. Indeed, classification is an inherent right and power in the legislature, and the constitutional guaranty of equal protection of the laws does not dispense with all classification. Constitutional provisions against discriminatory laws do not require laws to apply to everyone within the state and to affect all in an identical manner. The Constitution does not exclude class legislation, provided there is reasonable basis for the classification. If a particular classification is proper the discrimination it involves is unobjectionable.

"So long as classifications have a real and substantial basis they cannot be said to be violative of the equal protection clause even though the lines drawn therein are very narrow. If the law affects all similarly situated in the same manner, it satisfies the constitutional requirement."

See Board of Regents v. Roth (1972), 408 U.S. 564.

We hold that the conditions under which auxilary [sic] services teachers, such as plaintiff, worked in the Austintown School District, were a result of the United States Supreme Court decision upholding the constitutionality of governmental aid to religious nonpublic schools and that this was a real and substantial basis for the conditions of employment for such auxiliary services teachers.

Specifically, plaintiff alleges that defendant Board violated its policies set out in Austintown's Policy Handbook in its treatment of plaintiff in the following policies: (1) Contracts; (2) Evaluation; (3) Professional Personnel Policy; (4) Special Reading Classes; (5) Appointment, Assignment and Transfer of Employees; (6) Grievance Procedures; (7) Equal Opportunity Policy; and (8) Reduction in Force Policy.

Plaintiff claims that auxiliary services teachers were treated differently from regular teachers in that auxiliary services teachers' contracts contained language that continued service was contingent upon funding by the State of Ohio. There was no authority for such language either by statute or from the State Board of Education. Auxiliary services was [sic] new to the public school superintendents in Ohio during subject time period and there was no guidance from the State Board of Education as to what type of limited contracts to give to auxiliary service teachers. Mr. Valot testified that such language was used in the beginning years of such contracts, because the constitutionality of such program was being litigated in the federal courts. Eventually, they eliminated such language from the auxiliary service contracts. The only purpose that such language served was to

inform auxiliary services teachers that their services were being solely paid by state funds and was [sic] contingent upon such funds. Plaintiff was discharged for poor performance rather than because of subject language so that we cannot understand how subject language prejudiced plaintiff.

Plaintiff points out that the Austintown's Teacher Contract Policy provided that a limited contract should be for one (1) year and that plaintiff's contract received a limited contract from September through June. R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year. We hold that plaintiff's limited contracts with defendant Board complied with R.C. 3313.62.

Plaintiff also points out that all auxiliary services limited teaching contracts were terminated in April of each year. Evidence of defendant Board was that teachers

in public schools in special programs were also similarly nonrenewed contingent upon the programs being refunded by the state or for reduction in force.

Plaintiff also claims, under this assignment of error, that defendant Board did not comply with its "Teacher Contract Non-Renewal Policy" because plaintiff was not advised of the reason for her non-renewal and none of her witnesses were allowed to testify at the June 1, 1979 meeting of defendant Board. This was discussed and determined under plaintiff's first assignment of error.

Plaintiff has three complaints on her evaluation. She points out that Austintown's Policy Handbook under the title of "Management of Staff Evaluation" provides that all staff members in their first and second year of employment will participate in a professional growth evaluation process and that plaintiff was evaluated for the first

time in her fourth and final year of teaching. Mr. Valot testified that this rule was changed in 1978; that prior to that time the rule stated that "Initial formal evaluation should focus on second year staff members;" that the principal of each school performs such evaluations and that he assumed that the principal of Immaculate Heart of Mary evaluated plaintiff because such principal had to recommend plaintiff for employment each year. Immaculate Heart of Mary had no record of evaluations of plaintiff.

There is nothing in the record to indicate that Mr. Valot deliberately overlooked the professional growth evaluation process of plaintiff. That was a matter that he delegated to the principals of schools, and plaintiff did not have a public school principal. We hold that that is not a constitutional question pursuant to the Ryan Case.

Plaintiff points out that unlike teachers in the public schools, who were evaluated by their principals, plaintiff was evaluated by Dr. Baker, Direction of Instruction. We hold that this was a condition of employment for plaintiff that was common to all auxilary [sic] service teachers as a result of the United States Supreme Court decision in Wolman v. Essex (1977), 433 U.S. 233 and that defendant Board and this court are bound by such decision.

Plaintiff complains that the evaluation done by Dr. Baker was threatening, confusing, subjective and unreasonable. Both Mr. Valot and Mr. Donald H. Evans, president of the Austintown Education Association, testified that Dr. Baker is the most trained and best qualified in the Austintown School System to give evaluations of teachers.

Plaintiff also complained that Dr. Baker evaluated plaintiff by both the Micro Teaching Observation and the appraisal by Targets instruments. We hold that the person performing such evaluation is authorized to use both instruments for evaluation by the applicable policy statement.

We have reviewed plaintiff's claims of alleged violations by defendant Board of its policies on Professional Personnel Policy; Special Reading Classes; Appointment, Assignment and Transfer of Employees; Grievance Procedures; and Reduction in Force and hold that such claims are irrelevant to this action.

Plaintiff's claim as to the policy in Austintown's Policy Handbook entitled "Equal Opportunity Policy" deals with alleged age discrimination against plaintiff. We have discussed and determined this claim under plaintiff's second assignment of error.

The record of this case establishes that defendants, Mr. Valot and Dr. Baker, attempted to treat plaintiff the same as the teachers in their public school system as much as it was possible to do so under the circumstances that plaintiff was hired under the auxiliary services program.

We hold that plaintiff was not deprived of constitutional equal protection and due process rights in this case. We further hold, as a matter of law, that Sections 1983 and 1985(3) of Title 22 of the United States Code are inapplicable to the facts of this case pursuant to the Ryan case.

For the foregoing reasons, we hold that neither Sections 1983 or 1985 of Title 22 of the United States Code are applicable to this case and that plaintiff's third and fourth assignments of error are without merit.

Plaintiff's fifth assignment of error is that the trial court erred in failing to

grant a jury trial on the issues of age discrimination, deprivation of equal protection and due process rights, conspiracy to deprive appellant of her constitutional rights and excessive entanglement between Austintown Local Schools and the Parochial Schools pursuant to the United States Constitution First Amendment.

In Plaintiff's original and amended complaints, she requested a jury trial.

The Journal Entry dated March 19, 1982, signed by the trial court, states as follows:

> "The parties have agreed that the Court shall take under advisement the motions for summary judgment filed by the defendants and render a judgment on Counts Two, Three, and Four of the plaintiff's claims for relief.
>
> "It is agreed between the attorney for the plaintiff, attorneys for the defendants, and the court that the matters remaining at issue are equitable in nature and should be tried to the Court without a jury. Therefore, the plaintiff has withdrawn her jury demand

> and the issues remaining in this case after the motion for summary judgment has been finally determined shall be [so in original]

On May 6, 1982, plaintiff filed a motion for a jury trial on Counts II, III and IV of her complaint. Defendants filed memorandums [sic] opposing plaintiff's motion for a jury trial on the grounds that plaintiff had waived any right to a jury trial and that plaintiff had no rights to a jury trial on her remaining claims.

Plaintiff filed an answer stating that she had never received or approved the March 19, 1982 Journal Entry and had not withdrawn her demand for a jury trial pursuant to Civil Procedure Rule 39(A).

By Judgment Entry dated June 17, 1982, the trial court overruled plaintiff's motion for a jury trial.

In appeals, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment or decision under review and of the regularity and legality of the proceedings below. 5 Ohio Jurisprudence 3d 109-110, Appellate Review, Section 553.

We have reviewed the entire record of this case and conclude that we must accept the March 19, 1983 [sic] Journal Entry as a waiver of a jury trial in this case pursuant to Civil Rule 39(A).

Furthermore, since we have agreed with the judgments of the trial court in sustaining defendants' motions for summary judgment for Counts II, III and IV of plaintiff's complaint, we hold that this assignment of error is moot.

For the foregoing reasons, we overrule plaintiff's fifth assignment of error.

Plaintiff's sixth assignment of error is that the trial court erred in granting summary judgment on plaintiff's cause of action alleging that the excessive administrative and political entanglement between Austintown Local Schools and the Parochial Schools deprived appellant of her constitutional rights.

This assignment of error is Count V in plaintiff's Amended Complaint which was filed almost two years after plaintiff's Complaint. In this count, plaintiff alleged that R.C. 3317.06, as applied to auxiliary services teachers is unconstitutional.

Plaintiff is not contesting the constitutionality of R.C. 3317.06. If so, she would have been required, pursuant to R.C. 2721.12, to serve the Ohio Attorney General with a copy of the proceeding. This was not done in this case.

Plaintiff produced evidence that the van in which she taught is located on the property of Immaculate Heart of Mary Church and School. Defendant Board disputes this. If this was a taxpayer suit, such a fact, if established, would be a basis for declaratory and injunctive relief to move the van. However, this action is to have plaintiff's nonrenewal by defendant Board invalidated and to obtain reinstatement as a tenured teacher with backpay. We hold that there is no material connection between the alleged First Amendment violation under this assignment of error and plaintiff's demand for relief.

Plaintiff obtained her subject employment by filing an application with the Catholic Diocese of Youngstown who referred here to the Immaculate Heart of Mary Parochial School, who desired a remedial reading teacher under the auxiliary services program. The principal of Immaculate Heart of Mary

Parochial School referred plaintiff to defendant Board who hired plaintiff upon the recommendation of such principal. Plaintiff was rehired in subsequent years upon the recommendation of the principals of Immaculate Heart of Mary. Plaintiff is a Catholic and belongs to St. Christine Parish. If the above stated facts amount to excessive religious entanglement, we hold that plaintiff benefited from it rather than being hurt by it. The record indicates that plaintiff was hired by defendant Board because of the recommendations of the principal of Immaculate Heart of Mary School. There is nothing in the record that would indicate that plaintiff would have been hired by defendant Board for teaching in the public schools. The first time that plaintiff was evaluated by one of defendant Board's public school administrative personnel, plaintiff was non-renewed for poor performance as a teacher.

We conclude that plaintiff's Count V is another innovative attempt by plaintiff to find a theory to support a constitutional basis to avoid the established law applicable to her nonrenewal by defendant Board. None of the facts alleged by plaintiff to support this assignment of error have any material connection to the nonrenewal of plaintiff's teaching contract based on an evaluation of her performance.

We further conclude that this assignment of error is so lacking in merit as to be frivolous.

Defendant Board of Education filed an appeal from the June 15, 1983 judgment of the Common Pleas Court which overruled its motion for an award of attorney fees in the amount of $35,563.75, pursuant to 42 U.S.C. Section 1988, which provides, in pertinent part, as follows:

> "In any action or proceeding to enforce a provision of Sections

> * * * 1983, 1985 * * * of this title, Title IX of public law 92-318, or in any civil action or proceeding, by or in behalf of United States of America to enforce, or charging a violation of, a provision of * * * Title IX of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added).

The trial court, in its "Findings and Order" overruling subject motion, stated, in pertinent part, as follows:

> "The Court recognizes that the general 'American rule' does not permit the prevailing party (ies) to recover attorney fees, in the absence of statutory authorization, as part of the costs of litigation. The subject of costs is one entirely of statutory allowance and control. R.C. 3319.16 does not provide statutory authorization for the recovery of attorney fees in the case at bar.
>
> "One suggested exception to the 'American rule' (supra) is that attorney fees may be awarded where the losing party has acted in bad faith, vexatious-

> ly, wantonly, obdurately, or for oppressive reasons. The Court does not find that plaintiff's actions in this case were of that character."

Defendant Board's first assignment of error is that the trial court erred by using incorrect criteria in determining whether to award attorney fees pursuant to 42 U.S.C. Section 1988.

In Maine v. Thiboutot (1980), 448 U.S. 1, the court stated on page 11 that the fee provision of 42 U.S.C. Section 1988 "is part of the Section 1983 remedy whether the action is brought in federal or state court."

Plaintiff's attorney agrees that the standards used to determine an award of attorney fees in Federal Court, pursuant to 42 U.S.C. Section 1988, are applicable to state courts. Therefore, we hold that the trial court erred in applying the "American rule" to Counts III, IV and V of plaintiff's complaint and amended complaint because such

counts sought remedies pursuant to 42 U.S.C. Section 1988.

Defendant Board contends that 42 U.S.C. Section 1988 applies to the entire case even though two of plaintiff's five counts are based on state rather than federal law because it alleges that the state and federal causes of action arise from "the same nucleous of facts" pursuant to Church of Scientology v. Cazeres (5th Cir. 1981), 638 F. 2d 1272. However, we hold that although some of the operative facts are common to both sets of counts, there is enough difference in the operative facts that are the basis of Count I and II as compared to the operative facts of Counts III, IV and V that subject attorney fees, if allowable, should be apportioned to that which is applicable to Counts III, IV and V. See Brown v. Fairleigh Dickinson Univ. (D.N.J. 1983), 560 F. Supp. 391; Kaimowitz v. Howard

(E.D. Mich. 1982), 547 F. Supp. 1345.

Counsel for both parties agree that the leading case regarding the award of attorney fees to prevailing defendants, pursuant to 42 U.S.C. Section 1988 is Christiansburg Garment Co. v. EEOC (1978), 434 U.S. 412, a race discrimination case, which held that a prevailing defendant is to be awarded such fees only when the court, in the exercise of its discretion, has found that the plaintiff's action was frivolous, unreasonable, or without foundation.

The court in the above cited case stated, in pertinent part, on page 421, as follows:

> "* * * the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him * * *."

For the foregoing reasons, we hold that defendant Board's first assignment of error has merit.

Defendant Board's third assignment of error is that the trial court erred in failing to strike plaintiff's objection to Requests for Admission or, in the alternative, to compel appropriate responses in accordance with Civil Rules 36 and 37.

Defendant Board filed 6 Requests for Admission by plaintiff pursuant to Civil Rules 36 and 37 on September 24, 1982. Requests 1-3 sought authentication and admission that plaintiff had received two letters from the Ohio Education Association in 1979 advising her that further legal action would be "frivilous by Bar standards." Requests 4-6 sought admissions that plaintiff is a Roman Catholic; that Immaculate Heart of Mary School, where plaintiff was assigned, is operated by a Roman Catholic religious order

and that the Roman Catholic Diocese of Youngstown has had operational or supervisory authority over Immaculate Heart of Mary School since January 1, 1974.

On November 4, 1982, plaintiff filed objections to answering all of subject Requests for Admissions. On November 10, 1982, defendant Board filed a motion to strike plaintiff's objections to admissions as untimely, or in the alternative, to compel plaintiff to admit or deny each of the six requests within ten days of the order. The trial court did not rule on this motion.

We hold that Requests 1-3 are relevant to defendant's motion for attorney fees and that Requests 4-6 are relevant to plaintiff's fifth count in her Amended Complaint and that defendants motion to order plaintiff to answer defendant Board's Requests for Admissions should be sustained. Therefore, we we [sic] hold that defendant Board's third assignment of error has merit.

Since the trial court made no decision on this issue, pursuant to Appellate Rule 12(B), we will render the judgment that the trial court should have rendered. The motion of defendant Board to order plaintiff to answer defendant Board's Requests for Admission is sustained. Plaintiff must admit or deny each of the six requests within ten days of the journalization of this opinion pursuant to Civil Rule 37(A) or such requests for admission will be admitted as true.

Defendant Board's second assignment of error is that the trial court erred in not holding that plaintiff's conduct clearly met the criteria for an award of attorney fees under 42 U.S.C. Section 1988.

In the Christianburg case the court stated on page 420, in pertinent part, as follows:

> "If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear

> the way for suits to be brought under the Act; it also wanted to protect defendants from burdensome litigation having no factual or legal basis."

We have already held that plaintiff's assignments of error as to Counts III, IV and V have no merit and that pursuant to defendant Board's third assignment of error on its cross-petition that plaintiff must either admit or deny two letters from the Ohio Education Association in 1979 advising that further legal action would be "frivolous by Bar standards."

After reading the two voluminous volumes containing the original papers of the transcript of the record of this case, which include 121 items as well as the approximate 800 pages of depositions submitted by the parties, it is evident that plaintiff was very disappointed and upset because of her non-renewal by defendant Board on the basis of her poor performance as a teacher and

attempted to blame such non-renewal on conspiracies, discrimination and excessive religious entanglement. A considerable number of her complaints are clearly picayunish. She claims that she was harassed by Dr. Baker in his evaluation of her. One of the issues in this assignment of error is whether plaintiff, in effect, harassed the members and employees of defendant Board by filing Counts III, IV and V of plaintiff's complaint and amended complaint.

There is no question that plaintiff has a right to resort to a judicial determination of her legitimate rights. However, the question in this case is whether plaintiff should pay for the substantial attorney fees that defendant Board incurred in defending meritless constitutional claims of defendant and which will be paid out of public school funds pursuant to 42 U.S.C. Section 1988.

Since this case has to be remanded to the trial court, who has not had an opportunity to decide this issue on the basis of this opinion, we are going to remand this issue to the trial court for its determination.

Judgment affirmed as to Counts II, III, IV and V of plaintiff's complaint and amended complaint as well as overruling plaintiff's motion for a jury trial. As to Count I of plaintiff's complaint, judgment affirmed as to the part holding that plaintiff was not entitled to a continuing contract on her re-employment in August 1978 and reversed as to the part on factual questions as to whether plaintiff was advised by defendant Board of Education of the reason for its non-renewal of her teacher's contract on April 23, 1979 and whether she was permitted to have witnesses testify at the June 1, 1979 meeting of defendant Board of Education.

Judgment reversed on the overruling of defendant Board of Education's motion for an award of attorney fees pursuant to 42 U.S.C. Section 1988 as to Counts III, IV and V.

Case remanded for further proceedings pursuant to law as to the factual questions at issue in Count I of plaintiff's complaint and as to defendant Board of Education's motion for attorney fees pursuant to 42 U.S.C. Section 1988.

Final judgment as to defendant Board of Education's motion to order plaintiff to answer its Requests for Admissions. The motion of defendant Board of Education to order plaintiff to answer defendant Board's Request for Admissions sustained. Plaintiff must admit or deny each of the six requests within ten (10) days after the journalization of this opinion pursuant to Civil Rule 37(A) or such requests for admission will be admitted as true.

O'Neill, P.J. and Cox, J., concur.

UNITED STATES CODE

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

OHIO REVISED CODE

§3319.07 Employment of teachers.

The board of education of each city, exempted village, and local school district shall employ the teachers of the public schools of their respective districts. In making appointments teachers in the employ of the board shall be considered before new teachers are chosen in their stead. In city and exempted village districts no

teacher shall be employed unless such person is nominated by the superintendent of schools of such district. Such board of education, by a three-fourths vote of its full membership may reemploy any teacher whom the superintendent refuses to appoint. In local school districts, no teacher shall be employed unless nominated by the superintendent of schools of the county school district of which such local school district is a part; by a majority vote of the full membership of such board, the board of education of any local school district may, after considering two nominations for any position made by the country superintendent, reemploy a person not so nominated for such position.

§3319.08 Teacher employment and reemployment contracts.

The board of education of each city, exempted village, local, and joint vocational school district shall enter into

written contracts for the employment and re-employment of all teachers. The board of education of each city, exempted village, local, and joint vocational school district that authorizes compensation in addition to the base salary stated in the teachers' salary schedule for the performance of duties by a teacher which are in addition to the teacher's regular teaching duties, shall enter into a supplemental written contract with each teacher who is to perform additional duties. Such supplemental written contracts shall be limited contracts. Such written contracts and supplemental written contracts shall set forth the teacher's duties and shall specify the salaries and compensation to be paid for regular teaching duties and additional teaching duties, respectively, either or both of which may be increased but not diminished

during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not void such employment contract.

Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract is:

(A) For a superintendent, a contract for such term as authorized by section 3319.01 of the Revised Code;

(B) For an assistant superintendent, principal, assistant principal, or other administrator, a contract for such term as authorized by section 3319.02 of the Revised Code.

(C) For all other teachers, a contract for a term not to exceed five years.

A continuing contract is a contract that remains in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates. This section applies only to contracts entered into after August 18, 1969.

§3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless

the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the

superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted

by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.

§3319.16 Termination of contract by board of education.

The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause. Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its

treasurer of its intention to consider the termination of his contract with full specification of the grounds for such consideration. The board shall not proceed with formal action to terminate the contract until after the tenth day after receipt of the notice by the teacher. Within ten days after receipt of the notice from the treasurer of the board, the teacher may file with the treasurer a written demand for a hearing before the board or before a referee, and the board shall set a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the treasurer shall give the teacher at least twenty days' notice in writing of the time and place of the hearing. If a referee is demanded by either the teacher or board, the treasurer shall also give twenty days' notice to the superintendent of public

instruction. No hearing shall be held during the summer vacation without the teacher's consent. The hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a referee appointed pursuant to section 3319.161 [3319.16.1] of the Revised Code, if demanded; otherwise, it shall be conducted by a majority of the members of the board and shall be confined to the grounds given for the termination. The board shall provide for a complete stenographic record of the proceedings, a copy of the record to be furnished to the teacher. The board may suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action.

Both parties may be present at such hearing, be represented by counsel, require witnesses to be under oath, cross-examine

witnesses, take a record of the proceedings, and require the presence of witnesses in their behalf upon subpoena to be issued by the treasurer of the board. In case of the failure of any person to comply with a subpoena, a common pleas judge of the county in which the person resides, upon application of any interested party, shall compel attendance of the person by attachment proceedings as for contempt. Any member of the board or the referee may administer oaths to witnesses. After a hearing by a referee, the referee shall file his report within ten days after the termination of the hearing. After consideration of the referee's report, the board by a majority vote may accept or reject the referee's recommendation on the termination of the teacher's contract. After a hearing by the board, the board by majority vote may enter its determination

upon its minutes. Any order of termination of a contract shall state the grounds for termination. If the decision, after hearing, is against termination of the contract, the charges and the record of the hearing shall be physically expunged from the minutes, and if the teacher has suffered any loss of salary by reason of being suspended, he shall be paid his full salary for the period of such suspension.

Any teacher affected by an order of termination of contract may appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. The appeal shall be an original action in the court and shall be commenced by the filing of a petition against the board, in which petition the facts shall be alleged upon which the teacher relies for a reversal or

modification of such order of termination of contract. Upon service or waiver of summons in said appeal, the board shall immediately transmit to the clerk of said court for filing a transcript of the original papers filed with the board, a certified copy of the minutes of the board into which the termination finding was entered, and a certified transcript of all evidence adduced at the hearing or hearings before the board or a certified transcript of all evidence adduced at the hearing or hearings before the referee, whereupon the cause shall be at issue without further pleading and shall be advanced and heard without delay. The court shall examine the transcript and record of the hearing and shall hold such additional hearings as it deems advisable, at which it may consider other evidence in addition to the transcript and record.

Upon final hearing, the court shall grant or deny the relief prayed for in the petition as may be proper in accordance with the evidence adduced in the hearing. Such an action is a special proceeding within the purview of section 2505.02 of the Revised Code and either the teacher or the board may appeal therefrom.

In any court action the board may utilize the services of the prosecuting attorney or city solicitor or director of law as authorized by section 3313.35 of the Revised Code, or may employ other legal counsel.

RULES OF THE SUPREME COURT OF THE UNITED STATES

RULE 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when

there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of of[1] the United States Court of Appeals for the Federal Circuit, the United

States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

[1]So in original.

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-692

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

KATHRYN A. SHUBA,

Petitioner,

vs.

AUSTINTOWN BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

REPLY BRIEF OF PETITIONER

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* * * *

On Petition for Writ of Certiorari

To the Supreme Court of Ohio

* * * *

REPLY BRIEF OF PETITIONER

ARGUMENT

I. A FINAL JUDGMENT HAS BEEN ENTERED FOR THE ISSUES SPECIFIED IN THE PETITION FOR WRIT OF CERTIORARI THEREBY

GRANTING THIS COURT JURISDICTION OVER THESE MATTERS.

The Supreme Court of the State of Ohio dismissed the Petitioner's appeal on constitutional issues, sua sponte, thereby forclosing Petitioner's opportunity to seek redress for the violation of her equal protection and due process rights, which were the only issues described in her petition.

Respondent argues that, as a result of the Court of Appeals for the Seventh Judicial District of Ohio remanding of Petitioner's contract claim to the trial court for further determination, this court has no jurisdiction to review this alleged non-final judgment.

It has been well established that if upon remand a favorable outcome would render other issues moot, then the judgment from which a Writ of Certiorari is sought is not final within the meaning of 28 U.S.C. §1257. See generally, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Flynt v. Ohio, 451 U.S. 619 (1981).

It is Petitioner's contention that regardless of the ultimate outcome of the trial court's determination of Petitioner's contract claim, the equal protection and due process claims raised in the petition will not be rendered moot.

In the instant case, Petitioner alleges that the disparate treatment given to teachers assigned to the auxiliary services program deprives them

of liberty and property interests in violation of their equal protection and due process rights as guaranteed by the Fourteenth Amendment to the Constitution.

As teachers assigned to the auxiliary services program, they were systematically denied equal access to evaluation, performance consultation, job transfers and other career advancement opportunities. They could be terminated at the whim of the administration, without regards to qualification, in a fashion grossly disparate from other teachers in Respondent's teaching force. Hence, as to the issues presented in Petitioner's Writ of Certiorari, a final judgment exists, from which Petitioner may only vindicate her rights before this court and at this time.

II. PETITIONER RAISED ALL ISSUES CONTAINED IN HER PETITION FOR A WRIT OF CERTIORARI IN THE COURTS BELOW AND THEY ARE PROPERLY BEFORE THIS COURT.

Respondent alleges that petitioner's due process/liberty interest, (Question 2 in the Petition), was not presented in the courts below and is not properly before this Court. Respondent made this allegation in each of the appellate courts below specifically because petitioner continually asserted a violation of her liberty interest resulting in the denial of her due process rights.

Specifically, Proposition of Law No. 4, raised in Petitioner's Memorandum in

Support of Jurisdiction to the Supreme Court of Ohio states:

> A teacher who holds a professional certificate has a property and liberty interest protected by the Ohio Constitution and the Fourteenth Amendment of the United States Constitution. (Petitioner's Appendix 60).

In Petitoner's brief before the Ohio Court of Appeals she cited as assignment of Error No. 3:

> The court erred by granting defendant's motions for summary judgments in regards to Kathryn Shuba's deprivation of equal protection and due process causes of action. (Petitioner's Appendix 61, 62).

Both propositions were issued in argument to indicate a deprivation of her due process rights occurred. Petitioner merely refined her "Questions Presented" so as to clarify her position in response to the adverse judgments below. In essence, Petitioner merely divided her

due process analysis to deal separately with the liberty interest in Question No. 2 and the property interest in Question No. 3. In this Petition, Petitioner augmented her due process liberty interest question to include a brief statement of the factual basis of the claim. To date, Petitioner has been denied all opportunity to proffer evidence in suport of her position. Despite the mere rewording, the question is predicated on the assignments of error developed below, and is properly before this Court.

III. PETITIONER'S DUE PROCESS CLAIMS WERE NOT PROPERLY RESOLVED UNDER STATE LAW AND THIS COURT MAY REVIEW THE DECISIONS BELOW TO DETERMINE IF THEY ARE IN

ACCORD WITH FEDERAL

CONSTITUTIONAL STANDARDS.

Petitoner has yet to be granted a forum in which to present her argument in support of her contention that she had acquired a property interest in continued employment with the Respondent. Respondent, in its Brief in Opposition, indicates that pursuant to State law, one who is employed under a limited teaching contract may be terminated without cause, pursuant to the provisions of Ohio Revised Code §3319.11 (providing essentially that to effecuate such a termination, only appropriate and timely notice be given). Petitioner has no argument with Respondent's argument, to the extent analyzed by the Respondent. However, Respondent's analysis is of

limited application to the facts and issues contained herein.

It is, and always has been Petitioner's contention that she had a property interest in continued employment for two reasons: first, at the time of Petitoner's termination she held a professional teaching certificate, which, pursuant to Ohio law entitled her to a continuing (tenured) contract and an expectancy of retention; and secondly, but for the disparate treatment accorded teachers assigned to the auxiliary services program of the Respondent, Petitioner would have held a professional teaching certificate prior to her having signed the contract for her final year of teaching. Pursuant to Ohio Statutory and case law, one who is entitled to a continuing contract is deemed to have

been granted tenure, despite the fact that the teacher signed a non-tenured contract. See generally, Ohio Revised Code §3319.11; Struthers City School Board of Educ. v. Struthers Educ. Ass'n, 6 Ohio St. 3d 308 (1983); Tracy v. Otsego Board of Educ., 6 Ohio St. 3d 305 (1983); Dayton Teachers Ass'n v. Dayton Board of Educ., 41 Ohio St. 2d 127 (1975).

To date, Petitioner has not been given an opportunity to proffer evidence to prove her entitlement to tenure. It is Petitoner's contention, that the courts below have misinterpreted the language of the statues involved, and hence have deprived her of her livelihood without the requisite procedural safeguards.

IV. PETITIONER'S EQUAL PROTECTION CLAIMS ARE OF GREAT IMPORTANCE IN THAT THE VIOLATION OF HER RIGHTS HAS DEPRIVED HER OF THE ABILITY TO EARN A LIVING.

Respondent argued that Petitioner did not have a fundamental right to continued employment and/or tenure, and that hence, "heightened scrutiny" is inappropriate.

Petitioner did not claim that she had a fundamental right at stake or that any type of "heightened analysis" should be used. Indeed, in the Petition for a Writ of Certiorari, Petitioner argued that "there is no rational basis" for the treatment accorded a teacher assigned to the auxiliary services program.

Petitioner is seeking review of the unfair, disparate treatment she received as a teacher in the auxiliary servies program. While this is not a class action, Petitioner believes that all teachers who serve in these programs are adversly affected. This program was administered in such a manner as to be unfair to any teacher.

CONCLUSION

Throughout the past five years of litigation, Plaintiff's arguments have been misconstrued and misunderstood as to Federal Constitutional principles. She has been denied the opportunity to present evidence in defense of her career as a teacher and her professional reputation. Throughout Petitioner's

career, she was arbitrarily classified as an auxiliary services teacher and not given the same opportunities for professional growth and enhancement as were regular teachers.

During her final year of teaching, the board deliberately concealed derogatory information and prevented her from enforcing her liberty interest through appropriate procedural safeguards. This ultimately resulted in ending her teaching career and she has been unable to teach and earn a living since 1979.

Petitioner continuously argued that she had a liberty interest and had acquired a property interest in continued employment, but was consistently denied the opportunity to present her case.

This matter is of great importance since it affects the rights of all

teachers who are so arbitrarily classified and subject to the capricious rulings of the school administrators. These auxiliary service teachers are denied the mechanisms and safeguards accorded to regular public school teachers.

Petitioner respectfully requests this Court grant a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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